( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No.

CENTRAL NEW ENGLAND RAILWAY COMPANY, PETITIONER,

vs.

BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR FOR THE BENEFIT OF NEW YORK CENTRAL RAILROAD COMPANY, ASSIGNEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT FOR THE COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS

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[fol. 1]

IN SUPERIOR COURT OF SUFFOLK COUNTY

NEW YORK CENTRAL RAILROAD COMPANY

v.

CENTRAL NEW ENGLAND RAILWAY COMPANY

Defendant's Substitute Bill of Exceptions—Filed Jan. 28, 1928

This is an action of contract tried before Callahan, J., and a jury in the Fifth Session of the Superior Court for Suffolk County and on February 23, 1927, the jury returned a verdict for the plaintiff in the amount of $169,012.72.

The Declaration, Demurrer, Waiver, Substitute Answer, Plaintiff's Motion for Specifications, the Defendant's Specifications, and Amended Motion to Dismiss are made a part of this Bill of Exceptions.

The defendant's amended motion to dismiss, to which was attached the report of the Interstate Commerce Commission and its certificate in Finance Docket No. 1479, was denied and the defendant's exception thereto duly noted. For the purpose of this motion the report of the Interstate Commerce Commission and its certificate in Finance Docket No. 1479, hereto annexed as "Exhibit A," was before the Court.

All exhibits introduced in evidence at the trial, some of which are hereto annexed, may be used at the hearing upon the Bill of Exceptions.

Offers in Evidence

The plaintiff introduced in evidence the lease of the Boston & Albany Railroad Company to the New York Central Railroad Company, dated November 15, 1899, the supplementary agreement with respect to said lease, also dated November 15, 1899, and agreement of acceptance of the [fol. 2] Massachusetts Act of July 17, 1900, dated September 19, 1900, all of which were contained in one instrument and were marked "Exhibit 1." This lease covered a period of ninety-nine (99) years from and after the first day of July 1900, and granted to the lessee the right of the lessor in

"its railroads and property of every description, whether within its location or not, including therein its railroad, lands and wharves, branches, tracks, side-tracks, road-beds, superstructures, station houses, depot grounds, depots, viaducts, bridges, piers, shops, buildings and fixtures; and also its engines, rolling stock, machinery, tools, furniture, appliances, telegraph apparatus and equipment; and all rights, franchises, easements, privileges, and appurtenances thereunto belonging, together with the right to demand and receive all tolls, rent, revenue, income and profits of the demised premises, including also therein all the right, title and interest of the said lessor in and to any and all railroads operated by it under lease or otherwise, and in and to any stock of other corporations owned by it or held by it, and all dividends therefrom, and the right of voting on the same (the counterparts of such leases and certificates of such stocks to be assigned and transferred simultaneously with the delivery of this indenture, or as soon as practicable thereafter), and in and to all contracts and obligations of or with other railroads, corporations or individuals, and all income, advantages and benefits to be derived therefrom, and hereby assigning and transferring unto the lessee, under the terms and provisions of this lease, and for the purposes thereof, and subject to all obligations and encumbrances thereon, all its property, franchises and estates of every description, however described, and wheresoever situated, and by whomsoever held, including money, material and supplies on hand, excepting only the corporate seal, the

stockholders' and directors' record books, and the transfer and stock books, to which the lessee may have access at reasonable times, and excepting all the property, real and personal, stated and included in a schedule hereto annexed, marked 'Schedule A,' the same being property not needed for the railroad purposes of the lessee, which said property so excepted or the proceeds thereof is hereby reserved for the use and benefit of the lessor and its stockholders as the directors thereof may from time to time determine."

The plaintiff then offered in evidence the agreement for the consolidation of the New York Central & Hudson River Railroad Company, the Lake Shore & Michigan Southern Railway Company, Geneva, Corning & Southern Railroad Company, the Terminal Railway of Buffalo, The Dunkirk, Allegheny Valley & Pittsburgh Railroad Company, Chicago, Indiana & Southern Railroad Company, Detroit & Chi-[fol. 3] cago Railroad Company, Detroit, Monroe & Toledo Railroad Company, Kalamazoo & White Pigeon Railroad Company, The Northern Central Michigan Railroad Company, and the Swan Creek Railway Company of Toledo, into The New York Central Railroad Company, which was marked "Exhibit 2". Article VIII of this exhibit includes the following language:

"Article VIII. The manner of converting the capital stock of each of said consolidating corporations into that of said consolidated corporation—shall be as in this Article stated:

a. The holders of the stock of the New York Central & Hudson River Railroad Co. shall be entitled to 2,255,810.66 shares of the stock of the Consolidated Corporation. Each stockholder of the New York Central & Hudson River Railroad Company shall be entitled to one share of the stock of the consolidated corporation for each share of the stock of the New York Central & Hudson River Railroad Co. owned by him at the time said consolidation shall become effective * * *"

Article XII of Exhibit 2, which is as follows, was then read to the jury:

"Article XII. The consolidating corporations, parties hereto, hereby severally sell, assign, transfer and convey to The New York Central Railroad Company, the consolidated corporation formed pursuant to this agreement, their respective railroads together with all the rights, powers, privileges, franchises and other property used in connection therewith or pertaining thereto.

"Upon the consummation of this consolidation, as provided by law, all and singular the rights, privileges, exemptions, franchises, property (real, personal and mixed), licenses, easements and interests of every kind, nature and description belonging to or in any way appertaining to said consolidating corporations, and each of them, shall be vested in and be the property of said consolidated corporation, and it shall succeed to and there shall attach to it all of the debts, obligations, contracts, tariffs, and any and all liabilities of each of the consolidating corporations.

"The foregoing shall not be deemed to exclude any other effects, rights or privileges provided by law as incident to or resulting from any such consolidation and not herein specifically mentioned."

Either the plaintiff or the defendant may refer to such parts of said lease or said agreement of consolidation as they may desire and may incorporate such parts thereof in [fol. 4] their brief as though both of said instruments were fully printed as part of this Bill of Exceptions.

The plaintiff then offered in evidence the agreement dated the 25th day of October, 1899, between the defendant and the Boston & Albany Railroad Company, which is the agreement upon which the plaintiff bases its right to recover in this action, which agreement was marked "Exhibit 3," a copy of which is hereto annexed and made a part of this Bill of Exceptions.

The defendant admitted said instrument contained the signature of the party whom the declaration alleged it to be.

The defendant admitted the execution of said agreement, but not the authority of the persons whose signatures appear thereon to bind the corporation, and said agreement was admitted subject to the objection and exception of the

defendant upon the above question of authority merely, no other objection or exception being urged.

Bills rendered to the Central New England Railway Company by the Boston & Albany Railroad, New York Central & Hudson River Railroad Company, Lessee, from September 12, 1902, until some time in 1914 and by the Boston & Albany Railroad, New York Central Railroad Company, Lessee, from 1914 to December 15, 1921, in each instance were approved and paid by the Central New England Railway Company. Payments so made were for operations of the Central New England Railway Company and miscellaneous services performed for it at Springfield; they were all of the charges made by the Boston & Albany Railroad (New York Central & Hudson River Railroad Company or New York Central Railroad Company, Lessee, as the case may be) to the Central New England Railway Company on account of the Springfield operation until December 15, 1921. The defendant has not operated into Springfield nor made any payments to the plaintiff since December 15, 1921. All of the payments made up to that time were made to the New York Central [fol. 5] Railroad Company or its corporate predecessor, lessee of the Boston & Albany, on bills rendered by the New York Central Railroad Company or its corporate predecessor. All charges made against the Central New England Railway Company up to and including December 15, 1921, were paid as above set out. Attached hereto is Exhibit 5, which is typical of the bills rendered and paid as above set forth.

A notice to admit facts under section 69 of the Practice Act was delivered by the plaintiff to the defendant and filed in court. The sections of this notice offered by the plaintiff were as follows:

"Notice to Admit Facts under Rule 37

Take notice that the plaintiff in this case requires the defendant to admit or deny for the purposes of this case only the several facts respectfully hereunder specified and the defendant is hereby required within the time provided in Rule 37 of the Superior Court to admit or deny the said

several facts, saving all just exceptions to the admissibility of such facts as evidence in this case.

Lowell A. Mayberry, Attorney for the Plaintiff.

Dated January 8, 1927.

To Choate, Hall & Stewart, Attorneys for Defendant.

The facts the admissibility of which is required are:

* * * * * * *

4. That subsequent to 1900 the Central New England Railway Company until December 15, 1921 made the payments called for under said agreement to the New York Central Railroad Company.

5. That on and after December 15, 1921 the Central New England Railway Company ceased making the payments called for by said agreement and declined to further perform the same."

In response to the above notice the defendant filed the following qualified admission of facts pursuant to notice under Rule 37:

"Qualified Admission of Facts Pursuant to Notice under Rule 37

The defendant in this case for the purposes of this case only hereby admits the several facts respectively hereunder specified, subject to the qualifications and limitations hereunder specified, and saving all just exceptions to the admissibility of any such facts or any of them as evidence in this [fol. 6] case.

Provided that this admission is made for the purposes of this case only and is not an admission to be used against the defendant on any other occasion or by any other than the plaintiff.

Choate, Hall & Stewart, Attorneys for the Defendant.

January 19, 1927.

To Mayberry, Hallowell & Mayberry, Attorneys for the Plaintiff.

* * * * * * *

(4) The defendant denies that subsequent to 1900 the Central New England Railway Company until December 15, 1921, made the payments called for under said agreement to the New York Central Railroad Co.

The defendant admits that payments covering operation under the agreement of October 25, 1899, from September 12, 1902, to December 15, 1921, were made by the Central New England Railway Company to the Boston & Albany Railroad Company (New York Central & Hudson River Railroad Company, lessee) until sometime in 1914 and to the Boston & Albany Railroad Company (New York Central Railroad Company, lessee) from 1914 to 1921. Said payments were for the total amount and were all of the charges made by the Boston & Albany Railroad Co. (New York Central & Hudson River Railroad Company or New York Central Railroad Company, lessee, as the case might be) on account of operation under the agreement of October 25, 1899, from that date until December 15, 1921.

(5) The defendant denies that on and after December 15, 1921, the Central New England Railroad Company ceased making the payments called for by said agreement and declined to further perform the same.

The defendant has not operated under the agreement of October 25, 1899, nor made payments under the same since December 15, 1921.

The following colloquy then took place:

Mr. Mayberry: If my brother admits that the payments were made to the lessee——

Mr. Hall: Well, I don't,—all I meant to say was that the [fol. 7] use of the word "Company" had no significance as distinguished from the Railroad.

The Court: Well, all right. But do you put the plaintiff upon its proof that these payments were in fact made?

Mr. Hall: No, they made the payments, we have admitted it in the answers to the notice to admit.

Howard M. Biscoe, a witness called by the plaintiff, for thirteen years vice-president of the New York Central Railroad Company, in charge of the leased line of the Boston & Albany Railroad, testified that he was familiar to some extent with the trackage agreement (Exhibit 3) between the New York Central or Boston & Albany, and the Central New England Railway Company.

On or about November 9, 1921, Mr. Biscoe received the following letter (Exhibit 7) from Mr. C. L. Bardo, president of the Central New England Railway Company, and general manager of the New York, New Haven & Hartford Railroad Company:

EXHIBIT 7

"Central New England Railway Co.

C. L. Bardo, President

New Haven, Connecticut, November 9, 1921.

Mr. H. M. Biscoe, Vice President, Boston & Albany Railroad, N. Y. C. R. R. lessee, Boston, Massachusetts.

DEAR SIR: Please take notice that this Company will discontinue operation of its lines north of Feeding Hills station, and between there and Agawam Junction, effective December 15, 1921. At said date this Company will cease to make use of the license and permission acquired by it by virtue of contract with your Company of October 25, 1899, and will discontinue payments thereunder as of said date.

The above discontinuance of operation is by virtue of certificate of the Interstate Commerce Commission, Division 4, dated September 8, 1921, in the matter of application of the Central New England Railway Company for a certificate of public convenience and necessity, Finance Docket #1479.

[fol. 8] If any questions of detail arise in connection with the discontinuance, they may be taken up and settled by mutual agreement between representatives of the two Companies.

Yours very truly, Central New England Railway Company, by (Signed) C. L. Bardo, President and General Manager."

SFM. K.

On November 11, 1921, Biscoe replied to Bardo by a letter (Exhibit 8):

EXHIBIT 8

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee, South Station

H. M. Biscoe, Vice-President

BD. Boston, Mass., November 11th, 1921.

Mr. C. L. Bardo, President & General Manager Central New England Railway Company, New Haven, Ct.

DEAR SIR: Referring to yours of the 9th in which you give notice of canceling the contract dated October 25, 1899, between your Company and ours for the uso ef our railroad between Agawam Junction and Springfield.

Will you kindly refer me to the clause in this contract under which you feel that you can give the notice given in your letter of the 9th.

Yours ruly, (Signed) H. M. Biscoe, Vice-President.

On November 21, 1921, Bardo telegraphed (Exhibit 9) Biscoe that on account of the discontinuance of Central New England operation, effective December 15, extensive repairs now being made by the Boston & Albany at Agawam Junction were unnecessary. On the same day Bardo wrote Biscoe a letter confirming the telegram, Exhibit 10. Mr. Biscoe replied to the telegram on November 22, 1921, by [fol. 9] letter (Exhibit 11):

EXHIBIT 11

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee, South Station

H. M. Biscoe, Vice-President

BD.

Boston, Mass., November 22, 1921.

Mr. C. L. Bardo, President Central New England Rly., New Haven, Conn.

DEAR SIR: Referring to your wire of the 21st:

The renewals at the tower at Agawam Junction have been in process for some time but were stopped on receipt of your letter of November 9th.

Will you kindly refer to my letter of November 11th and refer me to the clause in the contract under which you feel that you can give the notice given in your letter of the 9th. An early reply is requested.

Yours truly, (Signed) H. M. Biscoe, Vice-President.

On November 25, 1921, Mr. Biscoe received the following letter (Exhibit 12) from Mr. Bardo, which was dated November 21, 1921, and which was admitted subject to the objection and exception of the defendant:

EXHIBIT 12

Central New England Railway Company, Office of the President

C. L. Bardo, President

"Perfect Package Month"

New Haven, Conn., Nov. 21, 1921.

Mr. H. M. Biscoe, Vice-President Boston & Albany Railroad Company, Boston, Mass.

[fol. 10] DEAR SIR: Yours of the 11th instant at hand in connection with our notice in reference to the contract of October 25, 1899.

I do not know of any clause in the contract specifically authorizing us to give such notice. The contract however is one requiring your company to license and permit the Central New England Railway Company to do certain things up to 1940, but it does not require the Central New England Railway Company to make use of that license and permit during the whole of the term.

Yours truly, (Signed) C. L. Bardo, President.

On December 14, 1921, Mr. Biscoe replied (Exhibit 13) to Mr. Bardo's letter (Exhibit 12). His reply, which was as follows, was admitted subject to the objection and exception of the defendant:

EXHIBIT 13

Boston & Albany Railroad, N. Y. C. R. R. Co., Lessee, South Station

H. M. Biscoe, Vice-President

BD.

Boston, Mass., December 14, 1921.

Mr. C. L. Bardo, President Central New England Railway Co., New Haven, Conn.

DEAR SIR: Referring to yours of November 21st, in regard to the contract between your company and ours for trackage rights over our line from Agawam Junction to Springfield:

This contract gives your company a license to use our line until August 30th, 1940, and to pay us certain sums for the use of our line. There is, however, nothing in the contract that gives you any right to terminate it until its expiration date or to cease paying us the amounts named in the contract. Of course if you do not care to make use of the license that is your affair but does not affect the payments to us and we cannot accept your notice of November 9th that you will discontinue payments under the contract.

If your company desires to terminate the contract, we are prepared to meet with you at your convenience to consider under what, if any, terms the contract shall be cancelled.

Yours truly, (Signed) H. M. Biscoe, Vice-President.

[fol. 11] On December 29, 1921, Mr. Biscoe wrote Mr. Bardo a further letter (Exhibit 14), which was as follows:

EXHIBIT 14

Boston & Albany Railroad, N. Y. C. R. R. Co., Lessee, South Station

H. M. Biscoe, Vice-President

C/J. 15.06.

Boston, Mass., December 29, 1921.

Mr. C. L. Bardo, President Central New England Railway Company, New Haven, Connecticut.

DEAR SIR: I would appreciate a reply to my letter of December 14th, with regard to the contract between your company and ours for trackage rights over our line from Agawam Junction to Springfield.

Yours truly, (Signed) H. M. Biscoe, Vice-President.

On January 4, 1922, Mr. Biscoe received the following letter (Exhibit 15) from Mr. Bardo, which was admitted subject to the objection and exception of the defendant, and reads as follows:

EXHIBIT 15

Central New England Railway Company, Office of the President

C. L. Bardo, President

New Haven, Ct., Jan. 3rd, 1922.

Mr. H. M. Biscoe, Vice-President Boston & Albany Railroad, Boston, Mass.

DEAR SIR: Referring to your letters of December 14th and 29th, relative to contract covering use of tracks between Agawam Jct. and Springfield.

[fol. 12] As we look at the matter the contract has been terminated by virtue of our notice to your Company effective December 15th and therefore we feel that we cannot

consistently take up with you any question as to the terms upon which the contract "shall be cancelled."

As we view the matter, the Central New England Railway Company never agreed in writing or otherwise to continue the use of the tracks of your Company to 1940 or any other definite time. It did agree, however, to pay $15,000 as an annual compensation for the use of your tracks, and this it has done.

It seems to be clearly and forcibly implied, from the language of the agreement, that the Central New England Railway Company was required to pay a fixed rate for as long as it saw fit to use the tracks, and having discontinued the use of track upon proper notice, it does not recognize any further liability under the contract.

This letter is, of course, without prejudice.

Very truly yours, (Signed) C. L. Bardo, President.

On January 6, 1922, Mr. Biscoe wrote the following letter (Exhibit 16) to Mr. Buckland, who was then the Vice-President and General Manager of the Central New England Railway Company:

EXHIBIT 16

Boston & Albany Railroad, N. Y. C. R. R. Co., Lessee, South Station

H. M. Biscoe, Vice-President

BD.

Boston, Mass., January 6th, 1922.

Mr. E. G. Buckland, Vice-President & General Counsel Central New England Rly. Co., New Haven, Conn.

DEAR SIR: We have a contract with the Central New England Railway Company, dated October 25th, 1899, which provides that until August 30th, 1940, we give the Central New England a license to use our line, for which right they agree to pay us $15,000 a year.

[fol. 13] The Central New England has ceased to exercise this right and Mr. Bardo notified me that the contract

is cancelled. We find nothing in the contract which gives any right to the Central New England to cancel. The right to use, of course, is optional. I asked Mr. Bardo if he would kindly advise me under what clause of the contract he felt he could give notice of cancellation of the contract and he advised that he knew of no clause authorizing him to give us such a notice. I then said to him that if he desired to terminate the contract we were prepared to meet with him to consider under what, if any terms the contract should be cancelled and I am now advised that he does not care to discuss the matter and that he regards the contract as cancelled "by virtue of our notice to your company," although he has already advised me that he knew of no clause in the contract which would permit him to cancel it. You can well understand that this is not satisfactory to us. Before we take such action as in our opinion may be necessary to protect our interest it seemed only fair that I refer the matter to you to inquire if you felt from a legal standpoint that you could cancel this contract, and I would appreciate it very much if you would let me hear from you.

For reference I refer you to Mr. Bardo's letters of November 9th, November 21st, 1921, and January 3rd, 1922, and my letters of November 11th and December 14th, 1921.

Yours truly, (Signed) H. M. Biscoe, Vice-President.

On January 20, 1922, Mr. Biscoe received the following letter (Exhibit 17) from Mr. Buckland, dated January 18, 1922:

EXHIBIT 17

Central New England Railway Company, Office of the President

E. G. Buckland, Vice-President

January 18th, 1922.

hs.

Mr. H. M. Biscoe, Vice-President Boston and Albany Railroad, South Station, Boston, Mass.

DEAR SIR: Answering your inquiry of January the 6th with respect to the instrument which gives the Central New

England Railway Company a license to operate over your line until August 30th, 1940, upon the payment of $15,000 per year.

If this is a license it is not necessary that there should [fol. 14] be any proviso for cancellation. It is in the power of the licensee to stop availing itself of the license and the obligation to pay therefor unless the license is coupled with an interest in the property which substantially changes the character of the transaction.

This instrument was executed prior to The New York, New Haven and Hartford Railroad Company coming into control of the Central New England Railway Company. The facts and circumstances surrounding its execution indicate that it was the desire of the Boston and Albany thus to establish a competitive route. The Central New England, however, was compelled to assume the expense of all changes which were made as a condition of operating over the tracks of the Boston and Albany between Agawam Junction and Springfield. In these circumstances the instrument seems to have all the earmarks of a license and none of a contract imposing obligation upon the licensee. This being so and the licensee being at liberty to terminate the license at its pleasure it has simply availed itself of its rights.

The above is a brief statement of how the situation looks to us, but if you are not in accord with that view I agree with you that a conference is desirable, and if Mr. Bardo agrees with me we shall be glad to arrange the same.

Yours very truly, (Signed) E. G. Buckland, Vice-President & General Counsel.

On January 20, 1922, Mr. Biscoe replied to Mr. Buckland's letter (Exhibit 17) by the following letter (Exhibit 18), which was admitted subject to the defendant's objection and exception:

EXHIBIT 18

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee,
South Station

Boston, Mass., January 20th, 1922.

CC to Mr. G. H. Fernald, Jr.

Mr. E. G. Buckland, Vice-President & General Counsel,
Central New England Railway, New Haven, Conn.

DEAR SIR: In reply to your letter of the 18th inst. with reference to the agreement of October 25, 1899, between the Boston & Albany Railroad Company and the Central New England Railway Company, I am advised that the agreement did not create a license revocable at the pleasure [fol. 15] of the licensee. It is also clear from this agreement and the earlier agreement of May 9, 1898, that the right created was not sought by the Boston & Albany, but by the parties who were reorganizing the Philadelphia, Reading & New England Railroad Company.

I understand from your letters, from previous letters from Mr. Bardo, President of the Company, and from the failure of the Railway Company to meet the payment due in accordance with the terms of the agreement, that the Central New England Railway Company repudiates its obligations under the contract.

Consequently I wish to give you notice that The New York Central Railroad Company, as successor to the rights of the Boston & Albany Railroad Company under the agreement, will hold the Central New England Railway Company to the contract.

If you wish to discuss this matter we will be glad to meet you.

Yours truly (Signed) H. M. Biscoe.

At the time of the admission of Exhibit 18 the Court made the following observation to the jury:

"The Court: In connection with that last letter, Mr. Foreman and gentlemen of the jury, in view of the objection made and the ruling of the Court that it is admissible,

I think it is my duty to instruct you that it, of itself, in the absence of any admissions on the part of the defendant, is not evidence of the doings or wishes of the Philadelphia Company."

On February 7, 1922, Mr. Biscoe again wrote Mr. Buckland (Exhibit 19) as follows:

EXHIBIT 19

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee, South Station

H. M. Biscoe, Vice-President

Boston, Mass., February 7, 1922.

C/J. 15.06.

Mr. E. G. Buckland, Vice-President and General Counsel Central New England Railway, New Haven, Conn.

DEAR SIR: I would appreciate a reply to my letter of January 20th, with reference to agreement of October 25, 1899, [fol. 16] between the Boston & Albany Railroad Company and the Central New England Railway Company.

Yours truly, H. M. Biscoe, Vice-President.

On February 11, 1922, Mr. Biscoe received the following reply (Exhibit 20) from Mr. Buckland, dated February 10, 1922:

EXHIBIT 20

Central New England Railway Company, Office of the President

E. G. Buckland, Vice-President

bs.

February 10th, 1922.

Mr. H. M. Biscoe, Vice-President Boston and Albany Railroad, South Station, Boston, Mass.

DEAR SIR: Answering yours of February the 7th asking for a reply to yours of January the 20th with reference to

the Central New England Railway trackage between Agawam Junction and Springfield.

Your letter of January 20th did not in terms call for a reply. I sent a copy of it to the President of the Central New England Railway Company, Mr. C. L. Bardo, and to Mr. F. A. Farnham, Counsel at Boston, and I assume that they will in the near future write to you suggesting a discussion of the matter.

Yours very truly, E. G. Buckland, Vice-President & General Counsel.

On March 17, 1922, Mr. Biscoe wrote the following letter (Exhibit 21) to Mr. F. A. Farnham, counsel for the New York, New Haven & Hartford Railroad Company, but received no reply from him:

EXHIBIT 21

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee, South Station

Boston, Mass., March 17th, 1922.

BD.

H. M. Biscoe, Vice-President

[fol. 17] Mr. F. A. Farnham, Counsel N. Y. N. H. & H. R. R., Boston, Mass.

DEAR SIR: You were here on February 23rd in regard to the contract of the Central New England to use our track between Agawam Junction and Springfield.

I would appreciate very much a reply from you as to the position of your Company. This matter has now been before your Company something over three months and we would like to get it settled.

Yours truly, (Signed) H. M. Biscoe, Vice-President.

Since December 15, 1921, the defendant has made no payments under the agreement (Exhibit 3).

* * * * * * *

On cross-examination the witness testified as follows:

* * * * * * *

A plan of the Springfield yard and surrounding tracks as of January 1, 1922, was then admitted in evidence as Exhibit 22, which is hereby referred to and made a part of this Bill of Exceptions, but need not be printed.

* * * * * * *

The witness: * * * There were some changes in the Springfield yard, work on which began in 1918. The condition of the main line tracks through the station was substantially the same from 1902 up to 1918 when the changes began but they made some changes in the tracks in the Liberty Street yard between 1902 and 1921.

* * * * * * *

The defendant then offered a colored map of Southern New England and the eastern part of the State of New York, showing in different colors the lines of the New York, New Haven & Hartford Railroad Company, the Central New England Railway Company, the Boston & Albany Railroad Company, the New York Central Railroad Company, and other carriers west of the Hudson River. This map, to the accuracy of which no objection was made by either party, was admitted as Exhibit 23 solely for the pur-[fol. 18] poses of showing how the Boston & Albany Railroad and the Central New England Railway came into Springfield. This exhibit may be referred to, but need not be printed.

The Witness: There was no station on the Central New England between Feeding Hills and Springfield and Agawam Junction was just a point where the Central New England intersected with the Boston & Albany, New York Central & Hudson River, or New York Central, Lessee.

* * * * * * *

It is four miles from Agawam Junction to the Union Station at Springfield and about three miles from Agawam

Junction to the West Springfield yards, so that it is about one mile from West Springfield yard to Union Station.

I understood from the letter of November 9, 1921 (Exhibit 7) that the reason Mr. Bardo gave for the discontinuance of operation over the lines of the New York Central was by virtue of a certificate of the Interstate Commerce Commission permitting the abandonment on the part of the Central New England. I do not recall that the subject of the discontinuance by the Central New England had ever been discussed by me with representatives of the Central New England before November 9, 1921. Mr. Bardo said there had been a certificate of the Interstate Commerce Commission permitting the discontinuance of operation and I had no reason to doubt what he said. I don't think I consulted with our counsel, Mr. Fernald, before replying to Mr. Bardo's first letter (Exhibit 7). I asked Mr. Bardo in the letter dated November 11, 1921 (Exhibit 8) for the clause in the contract, as I expressed it, under which Mr. Bardo felt he could give notice, and again, on November 22d, I asked him to state the clause in what I called the contract under which he felt that he could give notice. Mr. Bardo in his letter of November 21st, 1921 (Exhibit 12), stated that he did not know of any clause in the contract specifically authorizing him or his counsel to give such a notice. When Mr. Bardo said he was going to cancel I [fol. 19] wanted to find out what he relied on and why he was going to do it. I had not discussed the matter with Mr. Fernald, our counsel, at that period. I discussed the matter with Mr. Fernald, my counsel, at some later time and I think some of the letters were a joint result of our joint efforts. In the same letter that I asked Mr. Bardo to tell what clause he was acting under I suggested a meeting to consider under what terms the contract should be cancelled. On January 6, 1922, as a result of a conference with Mr. Fernald I wrote Mr. Buckland, the vice-president of the Central New England Company, the chief law officer of the New York, New Haven and Hartford Railroad. I wanted to sit down and talk about this thing; that had been my desire from the start. I had a talk with Mr. Farnham at lunch one day and I told him that Mr. Buckland had suggested that we talk about this matter and as I recall it he didn't seem to have anything to say at all. The conversa-

tion was very brief. I suggested to Mr. Farnham that it might be worked out that we have a bigger share of the traffic rates between Boston and New York in exchange for cancelling this contract. I offered to do that at this time. I thought, at this time of getting a greater share of the rate between Boston and New York over the Springfield line. That was something that I thought of what we might do. It was not the purpose of my meeting with them nor was it my purpose from the beginning. I wanted to sit down and discuss this matter, which they refused to do. I don't think that I made any other proposition to Mr. Farnham than that the Albany should be given a greater share of the through business between Boston and New York on the Springfield line. I suggested that to him, not as a proposition but something we might talk about. If that were done I don't know whether we would or not forget the Central [fol. 20] New England.

The defendant then moved that all the correspondence after the letter of November 9, 1921, be stricken from the record. This motion was based upon the defendant's contention that the letters were written for settlement purposes and included an expression of the legal relations of the parties.

The Court: The motion is denied and in connection therewith, Mr. Foreman and gentlemen, you will understand that the letters have been admitted solely upon the question whether the defendant Railroad Company abandoned the contract that it had with the plaintiff Railroad Company, and for no other purpose.

The Court also denied the motion of the defendant that the letter of January 3, 1922 (Exhibit 15) be stricken from the record, which motion was based upon the fact that said letter was written in answer to an inquiry on the part of Biscoe to get someone to commit himself as to some clause in the contract and contained the words "This letter of course is without prejudice." To the denial of this motion the defendant's exception was duly saved.

On redirect examination the witness testified as follows:

* * * * * * *

The Central New England first began to operate trains over this branch on September 15, 1902, and from then until May 28, 1904, three round trips week days and two round trips Sundays were operated. These were mixed trains. From May 29, 1904, to June 20, 1908, two round trips week days were operated by the Central New England. These were mixed trains. A mixed train is a combination of freight and passenger, a freight train with one or more passenger cars attached to it. From June 21, 1908, to June 5, 1915, the Central New England operated two mixed train round trips week days. From June 6, 1915, to June 23, 1917, two mixed train round trips were operated [fol. 21] week days and from June 24, 1917, to December 14, 1921, inclusive, the Central New England operated one round trip mixed train week days and none Sundays.

* * * * * * *

* * * The New York, New Haven & Hartford Railroad Company, both before and after December 15, 1921, had a line in Springfield and had the same connection with the coal fields and other shippers in the West and Southwest as the Central New England had.

James L. Treuden, a witness called by the plaintiff, testified as follows:

I have been general superintendent of the Boston & Albany Railroad Company, New York Central Railroad, lessee, since February 1, 1910. In 1902, at the time the Central New England began operating, I was train dispatcher at Springfield and remained such until October, 1904. After that I was made assistant train master superintendent, and general superintendent in February, 1910, and have remained so ever since. * * * On October 28, 1914, as a result of correspondence, the New Haven took over the care of the engine at their engine house on their property and the care of the passenger cars in the New Haven yard. The freight cars were handled as they always were. * * * Our facilities at Springfield and between Springfield and Agawam Junction in 1921 were sufficient to take care of the traffic of the New York Central as well as the traffic of the Central New England. * * *

On cross-examination the witness testified as follows:

* * * The New York, New Haven & Hartford Railroad enters Springfield from the south and their yard was located on the east and west side of their main lines parallel with the river. The main lines of the New York, New Haven & Hartford Railroad are on the south side of the Albany tracks. Their main track enters our main track [fol. 21a] and their trains go over our tracks in an easterly direction to the Springfield station. The Boston & Maine Railroad comes into the Springfield terminal from the north and they had a storage yard on the east and west side of their main track. The tracks of the Boston & Maine join the Boston & Albany tracks and their trains go into the Springfield station over our tracks.

There was a single connection across the line of the Albany running north and south and connecting the Boston & Maine and the New Haven.

* * * * * * *

The witness was then shown a blueprint of the connection between the New York Central and the Central New England, which was admitted as Exhibit 25. This plan showed the cross-over, switches, and 140 feet of track removed on May 15, 1922, from the switch point up to the so-called maintenance joint which was agreed to by the section foreman. The remaining 129 feet to the property line was removed by the New York Central October 6, 1922. The yellow indicates the removal of the tracks themselves. The property of the Central New England is shown beyond the broken line to the south.

The Witness: The effect of this removal was to physically prevent any trains of the Central New England upon the tracks of the Albany line unless they run their trains on the ground. That is why we took the rails up. The tower is still there.

* * * * * * *

East and west through Agawam Junction in December, 1921, I would say that there were fifteen passenger trains each way and I would say that about seventy per cent. of the trains were freight trains.

* * * * * * *

I would say that east of Springfield the percentage of freight trains would run down to about forty per cent. going from West Springfield east through the terminal.

* * * * * * *

[fol. 22] Henry J. Curry, another witness called by the plaintiff, testified as follows:

I am superintendent at Springfield for the New York Central Railroad Company, Boston & Albany Division. * * * The facilities of the New York Central at Springfield and on the Boston & Albany Division were adequate to take care of their own trains and to take care of six round trips of trains of the Central New England.

On December 10, 1921, I received a letter from Mr. Cuineen. This letter was admitted as Exhibit 26, and is as follows:

Exhibit 26

Copy

File A 1

The New York, New Haven & Hartford Railroad Company,
The Central New England Railway Company

Danbury, Conn., Dec. 10, 1921.

Mr. H. J. Curry, Supt. Boston & Albany Railroad, Springfield, Mass.

Dear Sir: Effective Dec. 15th, 1921, the Central New England Railway will discontinue operation of train service over your line between Agawam Junction and Springfield.

After the arrival of train 980 at Springfield, Dec. 14th, the train and engine crew and outfit will be run extra Springfield to Winsted, and after the above time we will not require the service of the tower or tower men at Agawam Junction.

Our accounting department will arrange to close up our freight and ticket accounts, and the C. N. E. Railway will

not participate in any further expense covering at your terminal.

Your very truly, (Signed) J. W. Cuineen, Superintendent.

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* * * * * * *

On or about April 26, 1922, I received a communication from Mr. Cuineen that he had removed the rails several hundred feet east of the east end of the Agawam Bridge, in order to prevent any possibility of cars getting away and fouling the main line of the New York Central, and to prevent any possibility of accident. The rail which Mr. Cuineen moved was on the branch line of the Central New England connecting with our main line, so that after April 26, [fol. 23] 1922, it was physically impossible for the Central New England to operate any trains over its line to its connection with the New York Central at Agawam Junction. At no time to my knowledge was this rail ever replaced by the Central New England.

* * * * * * *

In addition to Exhibit 22 a larger plan of the tracks and facilities at Springfield in 1921 was introduced in evidence as Exhibit 29, which is hereby referred to and made a part of this bill but need not be printed.

Witnesses for both plaintiff and defendant identified the various things shown on this plan in the same way that Messrs. Biscoe and Truden explained Exhibit 22 and subsequent witnesses referred to this exhibit during their testimony.

The freight house of the Boston & Albany Railroad is east of the station on the north side of the tracks. There is a freight yard adjacent to this house near Webster and Chestnut Streets. The Summer Street yard, which is the passenger yard, is entirely south of the main line tracks opposite the freight yard. Tower 40 is on the north side of the tracks between the station and the freight house. Tower 41 is at the west end of the station.

In the Springfield station the most northerly track is No. 5, which is the Boston & Maine track. The next southerly track is No. 3, a run-around freight track, which extended west to the Connecticut River Bridge. The next southerly is No. 1, the main line passenger west-bound, the next No. 2, the main line passenger east-bound. Both these tracks extend for miles in either direction. The next southerly track is No. 4, which is sometimes called the New Haven spur because up to 1922 it ran through the New Haven yard but not through the Boston & Albany station. It began again east of the station. Three tracks from the New Haven railroad yard joined tracks 2 and 4 from the south at the west [fol. 24] end of the station.

* * * * * * *

The engineer also testified that the distance from Tariffville, Connecticut, to Springfield is eighteen and a fraction miles and from Agawam Junction to Tariffville fourteen and a fraction miles.

* * * * * * *

* * * Mr. Edward E. Regan, a general superintendent of the New York, New Haven & Hartford Railroad Company and superintendent of the Central New England Railway Company * * * testified that the line of the Central New England from Feeding Hills to Agawam Junction is abandoned for service or operation, * * *.

* * * * * * *

A letter from Mr. Curry to Mr. Truden dated April 27, 1922, was then received in evidence as Exhibit 31 and is as follows:

Exhibit 31

File 15.06

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee

1-2. Springfield, April 27, 1922.

Mr. J. L. Truden, General Superintendent.

Dear Sir: Our conversation this morning in regard to removing a rail on the C. N. E. south of Agawam Junction to protect cars from running down to foul our main line.

Superintendent Cuineen, under date of April 26th, advised that they had already removed a rail several hundred feet east of the east end of Agawam Bridge in order to prevent any possibility of the cars getting away and fouling our main line.

Yours truly, H. J. Curry, Superintendent.

TGW.

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* * * * * * *

[fol. 25] OFFERS IN EVIDENCE

The defendant then formally offered the report and certificate of the Interstate Commerce Commission in Finance Docket No. 1497 as already offered in connection with the Motion to Dismiss as Exhibit A. This document was admitted in evidence and marked Exhibit A and is attached hereto.

The defendant then made the following offers of proof which were rejected by the Court and the defendant's exceptions thereto duly saved.

Defendant Central New England Railway offers to show that the system of the New York, New Haven & Hartford Railroad Company, as a part of which it is operated, did, during the calendar years 1921 to 1925, according to the valuations placed on the properties of the system by the Interstate Commerce Commission, adjusted each year after betterments and improvements, earn as a net railway operating income the following percentages: 1921, .84; 1922, 2.78; 1923, 3.02; 1924, 4.23; 1925, 4.75.

* * * * * * *

The defendant rested.

The plaintiff in rebuttal then offered a photostatic copy of the entire record of the proceedings before the Interstate Commerce Commission upon the application of the Central New England Railway filed June 15, 1921, being the proceedings as a result of which the Order, Exhibit A, was entered. The papers consisted of the application, the returning questionnaire, and the report and certificate of the Commission, said report and certificate being merely copies

of what the defendant has introduced as Exhibit A. The only new thing in the record being the application and the questionnaire. These papers were all admitted in evidence [fol. 25a] marked Exhibit 32 and the defendant's exception thereto duly noted, it being understood that no objection was made by the defendant on the ground of informality of proof and that the objection runs to the subs ance of the evidence offered. Exhibit 32 is hereto annexed.

* * * * * * *

Clyde E. Sturdivant testified that he was a brakeman in the employ of the Central New England from 1899 to 1904 and has since been in the employ of the Boston & Albany and that he served on a freight train of the Central New England for about a year following September 15, 1902 (the date of commencement of operations of the Central New England into Springfield), which train made two round trips from the West Springfield yard to Tariffville each day. On the average this train carried ten or twelve cars and on one occasion thirty cars. After the cessation of this freight service in 1903 the witness acted as brakeman on the passenger train of the Central New England from Springfield.

* * * * * * *

The plaintiff then offered the lease of the Hartford & Connecticut Western Railroad Company to the Central New England Railway Company.

Colloquy Between Court and Counsel.

Mr. Hall: I don't see the materiality of it, if the Court please.

Mr. Mayberry: I don't know that there is any materiality to it unless the argument be made at some time that this company had no right to make any such contract because they had no right to come into the Commonwealth of Mas- [fol. 26] sachusetts without Act of the Legislature and I offer that for that purpose.

The Court: Of course you disclaim any such argument as that?

Mr. Hall: Oh, no, your Honor, if that is offered for that purpose I prefer to have it go in rather than disclaim it.

The Court: Oh, you do? Then it may go in.

Mr. Mayberry: I assumed that was so.

Subject to the defendant's exception, a photographic copy of this document was admitted in evidence as Exhibit 34.

Mr. Mayberry: I call your Honor's attention to the date of the lease February 4, 1890, and the term of the lease which is for fifty years next consecutively ensuing from and after the 30th day of August, 1890, and in that connection I call your Honor's attention to the fact that that would cause this lease to expire on August 30, 1940, which is the time of the expiration of the traffic agreement in this case.

Mr. Mayberry: There is no question between us, is there, Brother Hall, but that the Central New England Railway Company is the present lessee or assignee of the lessee of this lease, the lessee here appearing to be the Central New England & Western Railroad Company, which I understand there is no question is the Central New England Railway Company?

Mr. Hall: No.

The plaintiff also offered the Special Act of the Massachusetts Legislature for the year 1899, Chapter 386, being an act to authorize the Hartford & Connecticut Western Railroad Company to extend its road into Massachusetts.

* * * * * * *

The defendant then duly made a motion in writing as follows that a verdict be directed for the defendant:

[fol. 27] Defendant's Motion for Directed Verdict

Now comes the defendant in the above entitled case and moves that the Court direct a verdict in its favor.

By Its Attorneys, (Signed) John L. Hall, Marcien Jenckes."

The Court denied this motion and the defendant's exception thereto was duly saved.

PLAINTIFF'S REQUESTS

* * * * * * *

22. As matter of law, the fact that on or about September 8, 1921, the Interstate Commerce Commission issued the certificate of public convenience and necessity to the defendant, a copy of which is set out in the defendant's answer, and that in pursuance of and in reliance on said certificate the defendant abandoned its line of railroad extending from Feeding Hills in the town of Agawam to its connection with the Boston & Albany Railroad and ceased the operation of trains over this line into the city of Springfield by way of the plaintiff's tracks does not constitute a defense to this action.

* * * * * * *

The Court granted each of these requests and the defendant's exceptions to the granting of them were duly saved by the Court.

DEFENDANT'S REQUESTS

1. Upon all the evidence the plaintiff is not entitled to recover.

* * * * * * *

The defendant then renewed its Amended Motion to Dismiss on jurisdictional grounds and the Court directed the Clerk to make the entry as of that day, "Motion again renewed and denied, to which order the defendant excepts."

CHARGE TO JURY

Charge by CALLAHAN, J.:

MR. FOREMAN AND GENTLEMEN: On October 25, 1899, the Central New England Railway Company and the Boston & Albany Railroad Company entered into a written agree-

ment, the alleged violation of which gave rise to this action. The agreement tacitly stated provided that the Boston & Albany Railroad Company would license and permit the de- [fol. 28] fendant, the Central New England Railway Company, to use its tracks for certain purposes stated in the agreement and that it would do certain other specific things for the sum of fifteen thousand dollars per year until August 30, 1940. The agreement was to go into effect so far as the use of the Boston & Albany's tracks were concerned and the rights of the Central New England Railway Company were concerned from and after the opening of a branch line which the Central New England Railway Company intended to build from Tariffville to a point at or near West Springfield. As suggested, the Central New England Railway Company bound itself to pay to the Boston & Albany Railroad Company the sum of $15,000 annually during the term of the contract and certain other sums for special switching service in connection with the Boston & Maine Railroad and the New York, New Haven & Hartford Railroad Company and from West Springfield to Springfield the line opened for the operation of the Central New England Railway Company on September 15, 1902, and from that time on the Central New England Railway Company paid the annual sum due up to December 15, 1921. On the latter date in accordance with a notice forwarded to the Boston & Albany, to the New York Central Railroad Company, the lessee of the Boston & Albany Railroad, the Central New England Railway Company ceased to operate the Boston & Albany Railroad and from that day it notified the Boston & Albany Railroad Company it would cease to pay $15,000 or any other sum thereafter for whatever rights it might have had under the contract.

Subsequent to the opening of the line the Boston & Albany Railroad Company was leased to the New York Central Railroad Company and the latter company by virtue of these lease rights is the plaintiff in this action. At this point I instruct you as follows: As a matter of law, the execution of [fol. 29] the agreement and supplemental agreement of November 15, 1899, leasing to the New York Central and Hudson River Railroad Company for a period of ninety-nine years from July 1, 1900, the railroad system and equipment of the Boston & Albany Railroad Company does not constitute a defense to this action.

As a matter of law, the plaintiff as lessee or assignee of the lessee of the Boston & Albany Railroad Company has a right to bring this action.

Let us now very briefly speak of the contract itself. You will notice as you read it that the first obligation assumed by the Boston & Albany Railroad Company is to license and permit the defendant to make certain uses of its tracks but this executed document, I instruct you gentlemen, means more than a mere license. By its terms the Boston & Albany Railroad Company assumed certain definite affirmative obligations to the Central New England Railway Company. For example, it undertakes to perform certain switching transfer operations for which in addition to the $15,000 mentioned it is to receive the special compensation fixed by the contract. Also in consideration of the sum of $15,000 and for no special compensation it agrees to sell tickets for the Central New England Railway Company; it agrees to handle baggage for the Central New England Railway Company; it agrees to take care of the defendant's passenger trains in the passenger yards of the Boston & Albany Company; it agrees to transfer through passenger cars to connecting lines, all of which are obligations that rest upon the Boston & Albany Railroad Company by force of the contract; therefore I have held and I instruct you now that the document is not a mere license revocable at the pleasure of either party and might not be revoked except as provided by the terms of the contract by a possible re- [fol. 30] vocation of the Boston & Albany Railroad Company but it is a contract that binds both parties to its terms and that it cannot be repudiated by either without answering in damages to the other. In connection with that I grant you the following requests for instructions.

As a matter of law the traffic agreement of October 25, 1899, the subject matter of this action, was not a revocable license terminable at the will of the defendant.

As a matter of law, the defendant had no right to repudiate on December 15, 1921, the traffic agreement of October 25, 1899, the subject matter of this action and thereby escape further liability to the plaintiff thereunder.

You may have inferred from some of the language used in the course of the trial that the New York Central Railroad Company and the New York, New Haven & Hartford

Railroad Company in their relations with the carrying out of this contract were acting by what I would describe as certain selfish motives. Such motives are immaterial, Mr. Foreman and gentlemen of the jury, and you need not be influenced by them in arriving at your conclusion concerning the issue here and that is true whether you consider the reasons for making the contract or the conduct, if any, of either of those railroads in reference to the carrying out or termination of the contract. In that connection I grant you the following request for instruction.

Any interest that the New York, New Haven & Hartford Railroad Company may have in the Central New England Railway Company is immaterial.

Thus it is, Mr. Foreman and gentlemen of the jury, that you are to determine certain issues here.

First: Was such contract made as that relied upon by the plaintiff in this case? That such a contract was in form [fol. 31] executed is not disputed but the burden of satisfying you by a fair preponderance of the evidence that such a contract was made rests upon the plaintiff and in that connection I give you these requests.

As a matter of law the failure of the defendant to deny the genuineness of the signatures to the written instrument declared upon constitutes an admission by it that the signatures are those of the parties whom the declaration alleges them to be.

As a matter of law the failure of the defendant to deny the genuineness of the signatures to the written instrument declared upon constitutes an admission as to the authority of the persons signing the same to act in behalf of the corporations for whom they purport to act.

Secondly. Was such contract repudiated by the defendant? In connection with that issue let me state to you, Mr. Foreman and gentlemen of the jury, that you are to attach no peculiar or odious significance to the word "repudiation." It is a legal term employed by the law itself to define an act by a party to a contract. An act may be of the most honest origin and for the most honorable motive but which act nevertheless constitutes an abandonment or repudiation of the contract, so you will understand when the word "repudiation" is used in these instructions it is

not intended to suggest any act of dishonesty. In this connection, was such contract repudiated? I grant you these requests for instructions—I grant these requests for instructions.

If the jury find that the defendant declined further to perform the traffic agreement of October 25, 1899, the subject matter of this action, from and after December 15, [fol. 32] 1921, and that the plaintiff was ready, and able and willing to perform the same the plaintiff is entitled to recover.

If the jury find that the defendant declined and refused further to perform the traffic agreement of October 25, 1899, the subject matter of this action, from and after December 15, 1921, and that it notified the plaintiff on or about November 9, 1921, that it would no longer operate its trains or otherwise avail itself of or perform the terms thereof or make the payments called for thereby after December 15, 1921, and did not in fact operate its trains in accordance with such notice and did not in fact thereafter make payments in accordance with this notice and that the plaintiff was ready, willing and able to perform its part of said agreement the plaintiff is entitled to recover.

The jury upon all the evidence will be warranted in finding the action of the defendant constituted in effect a repudiation of the tariff agreement of October 25, 1899, the subject matter of this action, and the plaintiff thereupon became entitled to recover the then value of all sums accruing thereunder until the expiration thereof on August 30, 1940, less whatever benefits, if any, have in the past or may in the future until August 30, 1940, accrue to it by reason of the defendants' failure or neglect to avail itself of the provisions thereof.

As a matter of law, the fact, if the jury find it to be a fact, that there was a severance of the physical connection between the rails of the Boston & Albany Railroad as operated by the plaintiff and those of the defendant at Agawam Junction subsequent to December 15, 1921, does not constitute a defense to this action.

And in that connection, Mr. Foreman and gentlemen of the jury, you have before you the letter written by the [fol. 33] Central New England Railway Company in November of 1921 to the Boston & Albany Railroad Company,

you will read the language of that letter, you will consider the correspondence following between the parties, you will consider what actually occurred thereafter; did the Central New England abandon the use of those tracks, of the Boston & Albany tracks, did the Central New England refuse to pay more money, and on those facts you will determine whether or not the Central New England Railway Company did, as alleged in the plaintiff's declaration, repudiate this contract.

Now, much has been said in the course of the trial as to the certificate of public convenience and necessity issued to the Central New England Railway Company by the Interstate Commerce Commission authorizing the company's abandonment of such of its track as ended at Agawam Junction. In that connection I instruct you as follows:

As a matter of law, the fact that on or about September 8, 1921, the Interstate Commerce Commission issued the certificate of public convenience and necessity to the defendant, a copy of which is set out in the defendant's answer, and that in pursuance of and in reliance on said certificate the defendant abandoned its line of railroad extending from Feeding Hills in the Town of Agawam to its connection with the Boston & Albany Railroad and ceased the operation of trains over this line into the city of Springfield by way of the plaintiff's tracks does not constitute a defense to this action.

If the defendant questions the authority of its president or its vice president to terminate or repudiate the tariff agreement of October 25, 1899, the jury may consider in that connection the fact, if they find it to be a fact, that the defendant has admittedly not operated its trains under the terms of said agreement nor made any payments therein [fol. 34] called for since the date fixed by its president and vice-president for the termination or repudiation of said agreement, to wit: December 15, 1921, as bearing upon the question of whether the defendant has adopted and ratified the acts of its said officers or either of them.

Upon all the evidence the jury would be warranted in finding that the conduct of the defendant amounted to a complete repudiation on December 15, 1921, of the contract upon which this action is brought, and entitled the plaintiff

to recover in this action the full damages which it sustained by such repudiation.

If the jury find that the defendant on December 15, 1921, repudiated the contract upon which this action is brought, the plaintiff was under no obligation thereafter to further perform its obligation under said contract, nor at all times thereafter to keep itself in a position to do so.

On the other hand unless the jury find that the defendant has entirely repudiated the agreement of 1899 the damages of the plaintiff are limited to the quarterly installment due on April 1, 1922.

And your next question will be this, if you find that the contract was repudiated, or let me say before I pass to that phase of these instructions. In order to make clear to you the present standing in this case of the so-called certificate of public necessity and convenience issued by the Interstate Commission—undoubtedly it raises a very interesting question of law as to the rights of the Central New England Railway Company thereunder in and to any contract that it might have then had pending with relation to the road, the part of the road abandoned—it has become the duty of this Court presiding at this trial to rule as a matter of law that the certificate issued by the Interstate Commerce Commission could not affect the contractual rights of the plaintiff in this case, that those rights supervened any action [fol. 35] of the Interstate Commerce Commission, it had a right to attempt to enforce them in an action like this. If I err as has been suggested here the Supreme Judicial Court of the Commonwealth will say so, if they do not say so why as to this question the Supreme Court of the United States may say so. It is your function, however, Mr. Foreman and gentlemen of the jury, for the purpose of this particular trial to accept your law as the trial judge gives it to you, so you will be guided by the opinion of the Court upon this somewhat important issue and the instruction of the Court is, so far as this question of liability is concerned, you dismiss from your minds all consideration of the certificate of the Interstate Commerce Commission.

* * * * * * *

Mr. Hall: I wish to except to your Honor's statement that they could dismiss from their minds all consideration

on the question of liability of the certificate of the Interstate Commerce Commission.

* * * * * * *

Wherefore the defendant being aggrieved by the foregoing rulings as made and the failure and refusals to rule, files this, its Substitute Bill of Exceptions, and prays that it be allowed.

By Its Attorneys, Choate, Hall & Stewart.

Order Setting Substitute Bill of Exceptions

January 25, 1928—Allowed as a substitute bill in lieu of the original bill duly filed.

Christopher T. Callahan, J. S. C.

[fol. 35a] Plaintiff's Declaration—Filed May 1, 1922

The plaintiff says that the defendant on or about October 25, 1899, entered into a contract in writing with the Boston & Albany Railroad Company, a copy of which is hereto attached and marked "A"; that said contract was to continue in effect until August 30, 1940; that under said contract the defendant was obligated to pay Fifteen Thousand Dollars ($15,000.00) per annum for the use of a portion of the Boston & Albany Railroad between Agawam Junction and Springfield, Massachusetts; that the plaintiff succeeded to all the rights of the Boston & Albany Railroad Company in said contract as the lessee of the Boston & Albany Railroad by virtue of a lease dated November 15, 1899; that the plaintiff and its predecessor, the Boston & Albany Railroad Company, have at all times been ready and willing to perform and have offered to perform the said contract and have performed said contract, except in so far as they have been prevented from doing by the acts of the defendant; that the defendant under date of November 9, 1921, notified the plaintiff that on December 15, 1921, it would cease to operate its trains over the Boston & Albany Railroad under said contract and would refuse to make any

further payments under said contract; that the defendant thereafter refused to pay to the plaintiff the bills due under said contract or to perform said contract after said December 15, 1921; all to the great damage of the plaintiff.

By Its Attorney, Geo. F. Fernald, Jr.

("A" printed on page 47.)

DEFENDANT'S DEMURRER—Filed May 22, 1922

Now comes the defendant in the above entitled action [fol. 36] and demurs to the plaintiff's declaration for the reason that the matters contained therein are insufficient in law to enable the plaintiff to maintain his action.

By Its Attorneys, Choate, Hall & Stewart.

I, Herbert Schnare, of counsel for the defendant, hereby certify that I am of the opinion that there is sufficient ground in law for the foregoing demurrer as to make it fit subject for judicial inquiry, and that the same is not intended for delay.

Herbert Schnare.

WAIVER OF DEMURRER—Filed Aug. 31, 1922

Now comes the defendant in the above entitled action and waives its demurrer heretofore filed, it being agreed that such waiver shall be without prejudice to the defendant's rights to raise in the later course of the proceedings the questions presented by the demurrer.

Choate, Hall & Stewart, Attorneys for Defendant.

Assented to by Geo. L. Mayberry, Attorney for Plaintiff.

DEFENDANT'S SUBSTITUTE ANSWER—Filed Sept. 1, 1926

Now comes the defendant in the above entitled action and without waiving the demurrer heretofore filed by it but expressly relying thereon, for answer to the plaintiff's declaration denies each and every allegation in the defendant's writ and declaration contained.

[fol. 37] And for further answer to the plaintiff's declaration the defendant says that the alleged contract attached to the plaintiff's declaration as Exhibit "A" was signed in pursuance of a previous agreement dated May 9, 1898, between the Boston & Albany Railroad Company, the Hartford & Connecticut Western Railroad Company, and the Philadelphia, Reading and New England Railroad Company and is Reorganization Committee, by the terms of which the defendant, Central New England Railway Company, was to be organized to enter into said Exhibit "A"; that, after the making of the contract alleged in the plaintiff's declaration both by the action of the plaintiff and the Boston & Albany Railroad Company jointly and severally, and also because of other circumstances not within the possible contemplation of the parties hereto at the time of the making of said agreement, the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant was rendered illegal, impossible, and such a hardship and heavy burden on the defendant as to be unenforcible, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

And for further answer to the plaintiff's declaration the defendant says that on September 8, 1921, in accordance with paragraphs 18 and 19 of Section 1 of the Interstate Commerce Act (41 U. S. Statutes at Large 474) a certificate of public convenience and necessity was issued to the defendant by the Interstate Commerce Commission, a copy of which is marked "Exhibit B" and annexed hereto and made a part of this answer; that in pursuance of and in reliance on this certificate the defendant abandoned its line of railroad extending from Feeding Hills in the Town of Agawam, County of Hampden, Massachusetts, to its con-[fol. 38] nection with the Boston & Albany Railroad, and ceased the operation of trains over this line into the City of Springfield, Massachusetts, by way of the plaintiff's tracks as provided in Exhibit "A" of the plaintiff's declaration.

By Its Attorneys, Choate, Hall & Stewart.

Filed by consent and allowed Sept. 1, 1926.

(Exhibit "B" printed on page 44.)

PLAINTIFF'S MOTION FOR SPECIFICATIONS AND ORDER THEREON—Filed Jan. 8, 1927

Now comes the plaintiff in the above entitled action and says that it is entitled to have stated in the defendant's answer with substantial certainty the substantive facts necessary to constitute its defense to this action, and that said answer is insufficient in that it fails to state such facts as to enable the plaintiff to meet the defense in part at least.

Wherefore the plaintiff moves that the defendant be ordered by the Court to file specifications specifying as follows:

First. Under the second paragraph of the defendant's substitute answer by what action of the plaintiff and the Boston & Albany Railroad Company, jointly, was the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant, rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

Second. Under the second paragraph of the defendant's substitute answer, by what action of the plaintiff was the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and [fol. 39] the performance of said arrangement by the defendant rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

Third. Under the second paragraph of the defendant's substitute answer, by what action of the Boston & Albany Railroad Company was the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

Fourth. Under the second paragraph of the defendant's substitute answer, what were the other circumstances not within the possible contemplation of the parties thereto at the time of the making of said agreement as the result of which the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant was rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

Fifth. Under the second paragraph of the defendant's substitute answer, in what way or by what means was the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

[fol. 40] Sixth. Under the second paragraph of the defendant's substitute answer, in what way or by what means was the performance of said arrangement by the defendant rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

Seventh. Under the second paragraph of the defendant's substitute answer by reason, or as a result, of what action of the plaintiff and the Boston & Albany Railroad Company, jointly and severally, and because of what other circumstances not within the possible contemplation of the parties thereto at the time of the making of said agreement, was the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant rendered contrary to the Constitution of the Commonwealth of Massachusetts.

By its Attorney, Lowell A. Mayberry.

Order on Above Motion

Boston, Jan. 14, 1927.—Specifications ordered as to 1, 2, 3, 4, 5 and 6 on or before Jan. 22, 1927. Need not answer No. 7.

James F. McDermott, Asst. Clerk.

Defendant's Specifications—Filed Jan. 22, 1927

Now comes the defendant in the above entitled case and in answer to the plaintiff's specifications numbered 1 to 6 says:

1. The action of the plaintiff and the Boston & Albany Railroad Company jointly consisted of:

a. The execution of an agreement and supplemental agreement of November 15, 1899, leasing to the plaintiff for 99 years from July 1, 1900, the entire line and property of [fol. 41] the Boston & Albany Railroad Company.

b. The failure and refusal by the Boston & Albany Railroad Company as leased and operated by the plaintiff to route any through traffic for points in the territory to the southwest over the shorter and more direct line of the defendant.

c. The diverting of freight shipments and other business of shippers by the defendant to their own lines.

d. The refusal of the Boston & Albany Railroad as leased and operated by the plaintiff to allow, permit or join with the defendant in establishing through rates from and to Springfield and points east and the territory southwest of Campbell Hall.

e. The prevention of the development of through traffic for the Southwest and the destruction of what through traffic was developed by the defendant.

f. The severance of the physical connection between the rails of the Boston & Albany Railroad as operated by the plaintiff and those of the defendant at Agawam Junction.

2. The action of the plaintiff consisted of:

a. The execution of an agreement and supplemental agreement of November 15, 1899, leasing for 99 years from July 1, 1900, the entire line and property of the Boston & Albany Railroad Company.

b. The operation and control of the said Boston & Albany Railroad Company in such way that:

I. It failed and refused to route any through traffic for points in the territory to the southwest over the shorter and more direct line of the defendant and also failed and refused to allow, permit or join with the defendant in establishing through rates from and to Springfield and points [fol. 42] each and points southwest of Campbell Hall.

II. Freight shipments and other business of shippers by the defendant were diverted to its own line and those of the plaintiff.

III. The development of through traffic for the southwest was prevented and what through traffic was developed by the defendant was destroyed.

IV. The physical connection between its rails and those of the defendant at Agawam Junction was severed.

3. The action of the Boston & Albany Railroad Company consisted of:

a. The execution of an agreement and supplemental agreement of November 15, 1889, providing for a lease of its entire line and property to the plaintiff for 99 years from July 1, 1900.

b. The failure and refusal to route any through traffic for points in the territory to the southwest over the shorter and more direct line of the defendant and also the failure and refusal to allow, permit or join with the defendant in establishing through rates from and to Springfield and points east and points southwest of Campbell Hall.

c. Freight shipments and other business of shippers by the defendant were diverted to its own line and those of the plaintiff.

d. The prevention of the development of through traffic for the southwest over the more direct line of the defendant and the destruction of what through traffic was developed by the defendant.

e. The severance of the physical connection between the lines of itself and the defendant at Agawam Junction.

4. a. The passage of the "Transportation Act" of February 28, 1920, 41 U. S. Statutes at Large 454, amending the [fol. 43] Interstate Commerce Act of February 4, 1887, as amended.

b. The lease of the Boston & Albany Railroad Company to the plaintiff and the failure and destruction of any through traffic from and to Springfield and points east and the territory to the southwest.

5. In the way and by the means set forth in specifications number one, two and three.

6. In the way and by the means set forth in specifications number one, two and three.

By Its Attorneys, Choate, Hall & Stewart.

Motion to Dismiss (as Amended)—Filed Feb. 8, 1927

Now comes the defendant in the above entitled action and moves that this cause be dismissed on one or all of the following grounds, the defendant moving that this motion be in amendment of the motion to dismiss heretofore filed.

(1) Because the "Transportation Act of February 28, 1920," 41 Statutes at Large 474, which amended the Interstate Commerce Act of February 4, 1887, as amended, gave to the Interstate Commerce Commission the exclusive jurisdiction of the subject matter involved in this case.

(2) Because the Interstate Commerce Commission in pursuance of the Interstate Commerce Act of February 4, 1887, as amended by the Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 29, 1917, August 10, 1917 and February 28, 1920, has acted on the subject matter involved in this suit and issued its

order thereon, a copy of which is hereto annexed and marked Exhibit "A" and made a part of this motion.

[fol. 44] (3) Because the Interstate Commerce Act of February 4, 1887, as amended by the Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 29, 1917, August 10, 1917, and February 28, 1920, has given to the Interstate Commerce Commission such jurisdiction of the subject matter of this case as to exclude this Court from any jurisdiction thereof.

(4) Because the Interstate Commerce Act of February 4, 1887, as amended by the Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 20, 1917, August 10, 1917, and February 28, 1920, and Sections 207 and 208 of the Judicial Code, being Act of March 3, 1911, 36 U. S. Statutes at Large 1148, and Act of October 22, 1913, 38 U. S. Statutes at Large 219, have given to the Federal Courts exclusive jurisdiction of the subject matter of this case in such way as to exclude this Court from any jurisdiction thereof.

By Its Attorneys, Choate, Hall & Stewart.

Filed Feb. 8, 1927, and denied.

1927, Feb. 21.—Motion renewed—again denied. (Callahan J.)

Exhibit A to Motion to Dismiss

(Referred to as Exhibit "B" in Defendant's Answer)

Interstate Commerce Commission

Finance Docket No. 1479

In the Matter of the Application of The Central New England Railway Company for a Certificate of Public Convenience and Necessity

Submitted September 3, 1921. Decided September 8, 1921

Certificate Issued Authorizing the Abandonment of a Line of Railroad in Hampden County, Mass.

F. G. Buckland for applicant.

[fol. 45] Report of the Commission

Division 4, Commissioners Daniels and Potter

By Division 4:

The Central New England Railway Company, a carrier by railroad subject to the interstate commerce act, on June 15, 1921, filed an application for a certificate that the present and future public convenience and necessity permit the abandonment of a line of the applicant's railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Hampden county, Mass., a distance of approximately 1.87 miles. No representations were made by the authorities of the State of Massachusetts either for or against the granting of the application. The case was submitted without formal hearing.

The applicant owns and operates about 300 miles of track in its entire system. Its trains enter Springfield, a city of more than 100,000 inhabitants, by using 4.05 miles of track of the Boston & Albany railroad. Under the trackage agreement the applicant is to pay the Boston & Albany Railroad Company $15,000 a year for the right to operate over this track not more than 3 freight trains of 30 cars each and 3 passenger trains daily. This agreement expires August 30, 1940.

The applicant proposes to abandon about 1.87 miles of track extending from Agawam to its connection with the Boston & Albany. The traffic is very light over this line; it is handled in one mixed train a day for the present time and it is not likely to increase in the near future. From Agawam an electic line runs directly into Springfield, haul- [fol. 46] ing passengers and light freight. For the year 1920 the revenue derived from the line proposed to be abandoned was $2,686.04, and the operating expenses were $41,518.62, resulting in an operating loss of $38,832.58.

Upon the facts presented we find that the present and future public convenience and necessity permit the abandonment of the line in question. A certificate to that effect will accordingly be issued.

Certificate

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office, in Washington, D. C., on the 8th Day of September, A. D. 1921

Finance Docket No. 1479

In the Matter of the Application of The Central New England Railway Company for a Certificate of Public Convenience and Necessity

Investigation of the matters and things involved in this proceeding having been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity permit the abandonment by the Central New England Railway Company of its line of railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Massachusetts, as described in the application and report aforesaid;

It is ordered, That said Central New England Railway Company be, and it is hereby, authorized to abandon said line of railroad;

[fol. 47] It is further ordered, That said Central New England Railway Company, when filing schedules canceling tariffs applicable to said line of railroad, shall in such schedules make specific reference to this certificate by title, date and docket number.

By the Commission, Division 4:

George B. McGinty, Secretary. (Seal.)

(In ink:) A true copy. (S.) George B. McGinty, Secretary.

Exhibit 3

(Referred to as "A" in Plaintiff's Declaration)

This agreement made this 25th day of October, 1899, between The Boston & Albany Railroad Company, herein-

after called the Albany Company, of the first part, and the Central New England Railway Company, hereinafter called the New England Company, of the second part, witnesseth:

Whereas the New England Company, in pursuance of the agreement between the parties hereto and others dated the ninth day of May, 1898, is now constructing and will shortly complete the branch railroad from Tariffville, Connecticut, to a point at or near West Springfield, Massachusetts, to connect with the lines of the Albany Company:

Now, therefore, it is agreed as follows:

First. The Albany Company from and after the opening of the branch line for the passage of regular trains until the thirtieth day of August in the year nineteen hundred and forty, shall license and permit, subject to the regu- [fol. 48] lation and control of the Albany Company as to the movement and government of trains, the said Central New England Railway Company, and its successors to pass with trains and locomotives over the line of the Albany Company between the point of connection west of the Connecticut River and the yard and engine houses at West Springfield in each direction, and further for passenger trains across the bridge over the Connecticut River and into the Union Station at Springfield, with the right to use in connection with such trains all present and future water stations and other facilities necessary for the accommodation of such trains and the traffic to be transported by them, the said New England Company paying to the Albany Company therefor, fifteen thousand dollars ($15,000.00) per annum in equal quarterly payments on the first days of January, April, July and October of each year, the first payment to be made upon the first quarterly period next succeeding the opening of the said branch line for the passage of regular trains.

If the daily average number of trains shall exceed three freight trains of not more than thirty cars in each train in each direction, and three passenger trains in each direction the price to be paid shall be increased in the proportion in which the increased number of trains exceeds the number of trains aforesaid and this computation shall be made once in six months during the term of this contract and payment shall thereupon be made accordingly. If said New England Company shall take water from any of the

water stations of the Albany Company it shall share in the expense of maintaining such stations in proportion to the consumption of water by each of the parties thereto, including therein the price paid by the Albany Company for water. If the New England Company shall use the stalls in the engine house of the Albany Company it shall pay One Dollar ($1.00) per day for each stall so used. The said [fol. 49] New England Company shall be permitted to erect a coal platform or trestle for the loading of its supply coal at some convenient point to be mutually agreed upon.

Second. The Albany Company shall transfer or switch loaded freight cars brought by the New England Company to the West Springfield yard to a connection with the Boston and Maine Railroad Company's lines or the New York, New Haven and Hartford Railroad Company's lines in Springfield in either direction for the rate or sum of Two Dollars ($2.00) per car without regard to destination or contents of such car, and shall move such freight so brought by the New England Company designed for points in Springfield in carload lots, excepting coal for the rate or sum of thirty cents (30c) per ton of two thousand (2,000) pounds; the rate or sum for so moving coal shall be fifty cents (50) per ton of tweny-two hundred and forty (2,240) pounds.

The foregoing rates include the return of empty cars and the hauling of empty cars furnished by the New England Company to be loaded on the lines of any other company and then returned. For such freight as is required to pass through the freight house of the Albany Company the rate or sum to be charged shall be fifty (50) cents per ton of two thousand (2,000) pounds, and in addition thereto a charge for the labor of handling, based upon the proportion which the business of the New England Company bears to the total amount of the business passing through such freight house, to be computed monthly, and only to include the expense of labor in such freight house.

Third. The Albany Company for passenger business shall sell tickets, handle baggage, and take care of passenger trains in its passenger yard and transfer through passenger cars to connecting lines.

[fol. 50] Fourth. The New England Company shall build and maintain an interlocking tower and its connections at the point of junction of its road with the road of the Albany Company.

The necessary men for the operation of said tower shall be appointed and paid by the Albany Company and primarily deemed to be the servants of the Albany Company. Their compensation, however, shall be reimbursed to the Albany Company, by the New England Company, quarterly.

Fifth. The employees of the Albany Company while operating any signal or throwing any switch or performing any duty in connection with the operation of the rolling stock, shall be considered to be the servants of that one of said parties the moving of whose rolling stock called for such operation or performance, and in case of any accident arising from the acts, omissions or neglects of said employees, if such operation or performance is occasioned by the moving of the rolling stock of both parties, if it can be ascertained by whose rolling stock the injury is actually done, that party shall be responsible, but if that cannot be ascertained, then the responsibilty for that accident shall be borne by both parties equally. Each party shall be liable for any damage done through failure or defect of its equipment. The Albany Company shall be liable for any damage done through the failure or defect of its roadway, but in case of any interruption of business by any accident or disaster, the New England Company or its successors or transferee shall have only the same temporary opportunities for the use of the tracks of the Albany Company proportioned to its business as the Albany Company then has and enjoys for its own traffic. All responsibility for baggage brought to said Union Station by either Company and destined to a station on the road of the other Company shall be upon the forwarding Company after such baggage is un-[fol. 51] loaded at said Union Station, and all responsibility for baggage delivered at said station to be forwarded by the New England Company shall be upon the said New England Company from the time of its delivery, and all responsibility for baggage received at said station from said New England Company for delivery in Springfield shall be upon the New England Company from the time of such receipt until the same is delivered.

Sixth. The said Central New England Railway Company and its successors shall make the payments required by this contract in accordance with the terms thereof.

Seventh. No transfer of this contract or the rights under it, in whole or in part, shall be made by the said New England Company or its successors without the consent in writing of the Albany Company, and this contract is made upon this condition, that in case of a breach of any of the stipulations to be observed on the part of the New England Company or those claiming under it, and a continuance of such breach for thirty days or in case the rights under this contract shall be taken from said New England Compnay or its successors or transferree by process of law, by proceedings in bankruptcy or insolvency or for a receivership or otherwise, the Albany Company or its successors may, while the default or neglect continues, or at any time after such taking by process of law, and notwithstanding any license or waiver of any prior breach of condition, without any notice or demand terminate this contract and all rights acquired thereunder by the said New England Company or any person claiming by, through or under it.

In witness whereof, the parties hereto have hereunto set their respective corporate seals, duly attested, the day and year first aforesaid.

The Boston and Albany Railroad Company, by Edward D. Hayden, Vice-President. Attest: E. D. Hayden, Secretary & Clerk. (L. S.) Central New
[fol. 52] England Railway Company, by John W. Brock, President. Attest: Clyde A. Hillne. (L. S.)

At a meeting of the Directors of the Boston & Albany Railroad Company held in Boston July 27th, 1899, it was voted: That the Vice President is hereby authorized in behalf of this Company to execute and deliver an agreement between the Boston and Albany Railroad Company and the Central New England Railway Company in the terms set forth in an agreement made May 9th, 1898, between the Boston and Albany Railroad Company and the Philadelphia, Reading and New England Railroad Company, George O. Fletcher and others and the Hartford and Connecticut Western Railroad Company.

A true copy. Attest:

E. D. Hayden, Secretary & Clerk.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this 27th day of October 1899, personally appeared Edward D. Hayden to me known, and who, being duly sworn, says that he resides in the City of Woburn, County of Middlesex and Commonwealth of Massachusetts, and is the Vice President of the Boston and Albany Railroad Company described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was thereto affixed by order the Board of Directors of said Company and that he signed the same as Vice President of the Boston and Albany Railroad Company by virtue of like order of the said Board of Di-[fol. 53] rectors; and said Edward D. Hayden also acknowledged before me that the foregoing instrument is the free act and deed of the said Boston and Albany Railroad Company.

Frank H. Ratcliffe, Notary Public. (L. S.)

A stated meeting of the Board of Directors of Central New England Railway Company was held at the Company's office at 192 Broadway, New York City, on Wednesday, August 30th, 1899, at which the following resolution was adopted:

Resolved: That the officers of this Company be, and they hereby are, authorized and empowered to execute, acknowledge and deliver in the name and on behalf of this Company, an agreement with the Boston and Albany Railroad Company, embodying the terms and provisions of the agreement between said Company and others bearing date the ninth day of May, 1898, which has been ratified and adopted by this Company.

A true copy. Attest:
Clyde A. Hillne, Secretary. (L. S.)

STATE OF NEW YORK,
City and County of New York, ss:

On the 25th day of October, 1899, before me personally came John W. Brock, with whom I am personally acquainted, who having by me been duly sworn, said that he resides in Philadelphia, Penn., that at the time of the exe-

cution of the foregoing instrument he was President of the Central New England Railway Company; that the seal affixed to the foregoing instrument was such corporate seal; that it was affixed by order of the Board of Directors of said Central New England Railway Company, and that he signed his name thereto by like order as President of said Central New England Railway Company, and the said John W. Brock as such President of said Central New England Railway Company, also acknowledged before me that the foregoing instrument is the free act and deed of said Cen- [fols. 54 & 54a] tral New England Railway Company and of himself individually.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 25th day of October A. D. 1899.

John C. McGroarty, Notary Public, Kings County, N. Y. (L. S.)

Copy. Attest: —— ——, Clerk.

Note.—The exhibits referred to, made a part of and attached to the foregoing Bill of Exceptions are filed herewith.)

[fol. 55] Thence the case was continued, to await the decision of the Supreme Judicial Court of the Commonwealth, from time to time unto the fourteenth day of June, A. D. 1928, when on said day, the following rescripts were received and filed in our said Superior Court, to wit:

In Supreme Judicial Court of Massachusetts, at Boston, June 14, 1928

Rescript

In the case of

New York Central Railroad Company

vs

Central New England Railway Co.,

Pending in the Superior Court for the County of Suffolk

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

If within ten days after rescript in this case the plaintiff amends its writ by substituting the words "The Boston & Albany Railroad Company, Assignor for the benefit of The New York Central Railroad Company, Assignee," in place of the words "The New York Central Railroad Company," as the plaintiff therein, leave to make such amendment [fol. 56] being hereby granted, then the defendant's exceptions are overruled; otherwise, they are sustained.

Plaintiff's exceptions overruled.

By the Court:

June 14, 1928. Walter F. Frederick, Clerk.

Brief statement of the grounds and reasons of the decision: See opinion on file.

In Supreme Judicial Court of Massachusetts, at Boston, June 14, 1928

Rescript

In the case of

New York Central Railroad Company

vs

Central New England Railway Co.,

Pending in the Supreme Court for the County of Suffolk

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz:

If within ten days after rescript in this case the plaintiff amends its writ by substituting the words "The Boston & Albany Railroad Company, Assignor for the benefit of The New York Central Railroad Company, Assignee," in place [fol. 57] of the words "The New York Central Railroad Company," as the plaintiff therein, leave to make such amendment being hereby granted, then the defendant's exceptions are overruled; otherwise, they are sustained.

Plaintiff's exceptions overruled.

By the Court.

Walter F. Frederick, Clerk.

June 14, 1928.

Brief statement of the grounds and reasons of the decision: See opinion on file.

In Superior Court of Suffolk County

No. 140,676

New York Central Railroad Company

v

Central New England Railway Company

Plaintiff's Motion to Amend Writ—Filed June 15, 1928—and Order Allowing Same

Now comes the plaintiff in the above entitled action and after rescript from the Supreme Judicial Court moves to amend its writ by substituting the words, "The Boston [fol. 58] & Albany Railroad Company, Assignor for the benefit of The New York Central Railroad Company, Assignee," in place of the words "The New York Central Railroad Company" wherever they may appear.

By its Attorneys, George L. Mayberry, Lowell A. Mayberry.

And the Court endorses the following on said motion to amend writ, to wit: "Allowed. Christopher T. Callahan, J. S. C."

June 18, 1928.

In Superior Court of Suffolk County

[Title omitted]

Motion to Stay Entry of Judgment and Order Allowing Same—Filed June 29, 1928

Now comes the defendant in the above entitled case and says that on June 21 it forwarded to the Chief Justice of the Supreme Judicial Court a petition for reargument of [fol. 59] certain points and that it has been advised by the Chief Justice that such petition will be considered by the Full Court.

Wherefore the defendant prays that entry of judgment may be stayed until further order of the court.

By Its Attorneys, Choate, Hall & Stewart.

And the Court endorses the following on said Motion to Stay Entry of Judgment, to wit: "29 June 1928. It appearing that application for reargument is being considered by the Supreme Judicial Court this motion is allowed. Louis S. Cox, J. S. C." (Seal of the Superior Court of Suffolk County.)

Thence the case was continued unto the third day of July, A. D. 1928.

[fol. 60] In Superior Court of Suffolk County

[Title omitted]

Motion for Entry of Judgment and Order Thereon—Filed July 3, 1928

Now comes the plaintiff in the above entitled action and represents to this Honorable Court that since the allowance of the defendant's motion for stay of judgment, pending a decision by the Full Court upon its petition for reargument, a decision has been handed down by that Court denying said petition.

Wherefore the plaintiff prays that the order entered upon the defendant's motion staying the entry of judgment be revoked and that judgment be entered forthwith in accordance with the rescript handed down in this action.

By Its Attorney, Lowell A. Mayberry.

[fol. 61] And the Court endorses the following on said Motion for Entry of Judgment, to wit: "6 July, 1928. The order of 29 June, 1928, staying entry of judgment is hereby vacated. Louis S. Cox, J. S. C." (Seal of the Superior Court of Suffolk County.)

Judgment

Afterwards, to wit: on the thirtieth day of July, A. D. 1928 it is considered and ordered by the Court that judg-

ment be, and hereby is, entered for The Boston & Albany Railroad Company, Assignor for the benefit of the New York Central Railroad Company, assignee (as amended) Plaintiff as aforesaid, against Central New England Railway Company, Defendant as aforesaid, upon said verdict, for the sum of one hundred eighty-three thousand five hundred seventy-five dollars and ninety-one cents damages, and costs of suit taxed at eighty-one dollars and five cents. [fol. 62] All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, Walter Perley Hall, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this twenty-third day of October, in the year of our Lord one thousand nine hundred and twenty-eight.

Francis A. Campbell, Clerk. (Seal of Superior Court.)

[fol. 63] In Superior Court of Suffolk County

[Title omitted]

Plaintiffs.	Defendants.	Action of Contract.
Plaintiffs' Counsel.	Defendant's Counsel.	Ad damnum $500,000.
George H. Fernald	Choate, Hall	
Geo. L. Mayberry	& Stewart.	
Lowell A. Mayberry	F. A. Farnham	
Aug. 30, 1922.		J.

Trustees.	Trustees' Counsel.	Trial List.
1.	1.	Oct. Gen. 1922
2.	2.	Oct. Gen. 1923
3.	3.	Oct. Gen. 1924
4.	4.	Oct. Gen. 1925
		Oct. Gen. 1926

Date.	No.	
1922.		
May 1.		Entered. Declaration filed.
May 20.	1	Defendant's jury claim.
May 22.	2	Defendant's demurrer.
May 22.	3	Answer.
Aug. 31.	4	Defendant's waiver of demurrer.
[fol. 64]		
1924.		
Dec. 12.	5	Defendant's motion to amend answer and amendment.

Date.	No.	
Dec. 29. 1926.		Motion to amend answer allowed.
Sept. 1.	6	Defendant's motion for leave to substitute amended answer and allowed.
Sept. 1. 1927.	7	Defendant's substitute answer.
Jan. 8.	8	Plaintiff's motion for specifications.
Jan. 10.	9	Copy of notice to plaintiff to admit Execution of Documents under Rule 37.
Jan. 10.	10	Copy of notice to defendant to admit facts under Rule 37.
Jan. 10.	11	Copy of notice to defendant to admit execution of documents.
Jan. 12.	12	Copy of notice to plaintiff to admit facts under Rule 37.
Jan. 14.		Specifications ordered filed as to 1, 2, 3, 4, 5 and 6 on or before January 22, 1927. Need not answer 7.
Jan. 15.	13	Plaintiff's admission of execution of documents pursuant to notice under Rule 37.
Jan. 18.	14	Plaintiff's notice to admit execution of documents under rule 37 filed by leave as of Jan. 12, 1927.
Jan. 18.	15	Defendant's notice to admit execution of documents under rule 37 filed by leave.
Jan. 18.	16	Plaintiff's notice to admit execution of documents under rule 37 filed by leave, as of Jan. 12, 1927.
Jan. 18.	17	Plaintiff's admission of facts pursuant to notice under rule 37.
Jan. 18.	18	Plaintiff's admission of execution of documents pursuant to notice under Rule 37.
Jan. 20.	19	Defendant's refusal to admit facts pursuant to notice under rule 37.
Jan. 20.	20	Defendant's qualified admission of facts pursuant to notice under rule 37.
Jan. 20.	21	Defendant's admission of execution of document pursuant to notice under rule 37.
Jan. 21.	22	Defendant's admission of execution of document under rule 37.
Jan. 21.	23	Defendant's motion to dismiss.
Jan. 22. [fol. 65] 1927.	24	Defendant's specifications.
Feb. 8.		Defendant's motion to dismiss denied.
Feb. 8.	25	Defendant's amended motion to dismiss—denied.
Feb. 18.	26	Defendant's motion for directed verdict—denied.
Feb. 21.		Defendant's motion to dismiss renewed, again denied. (See paper No. 23).
Feb. 21.		Defendant's amended motion to dismiss renewed, again denied. (See paper No. 25).
Feb. 23.	27	Verdict for plaintiff for $169,012.72—(54h).
Mar. 2.	28	Time for filing plaintiff's exceptions extended to June 1, 1927 inclusive.
Mar. 2.	29	Time for filing defendant's exceptions extended to June 1, 1927 inclusive.
May 31.	30	Defendant's proposed exceptions.
June 1.	31	Time for filing plaintiff's exceptions extended to June 8, 1927 inclusive.
June 3.	32	Time for filing plaintiff's exceptions extended to August 1, 1927 inclusive.
July 27.	33	Time for filing plaintiff's exceptions extended to August 8, 1927 inclusive.
Aug. 5.	34	Plaintiff's proposed exceptions.
Sept. 1.		Notice to all attorneys and to Callahan, J., under Rule 53.
Sept. 20.	35	Time for allowance of defendant's exceptions extended to November 1, 1927, inclusive.

Date.	No.	
Oct. 10.	36	Time for allowance of defendant's exceptions extended to January 1, 1928, inclusive.
Oct. 11.	37	Time for allowance of plaintiff's exceptions extended to January 1, 1928, inclusive.
Dec. 22.	38	Time for allowance of plaintiff's exceptions extended to February 1, 1928 inclusive.
Dec. 22.	39	Time for allowance of defendant's exceptions extended to February 1, 1928 inclusive.
1928.		
Jan. 25.		Plaintiff's substitute Bill of Exceptions allowed.
Jan. 28.	40	Plaintiff's substitute Bill of Exceptions filed.
Jan. 25.		Defendant's substitute Bill of Exceptions allowed.
Jan. 28.	41	Defendant's substitute Bill of Exceptions filed.
1928.		
June 14.	42	Rescript from Supreme Judicial Court.—"If within ten days after Rescript in this case the plaintiff amends its writ by substituting the words 'The Boston & Albany
[fols. 66 & 67]		Railroad Company, Assignor for the benefit of the New York Central Railroad Company, Assignee,' in place of the words 'The New York Central Railroad Company' as the plaintiff therein, leave to make such amendment being hereby granted, then the defendant's exceptions are overruled; otherwise, they are sustained. Plaintiff's exceptions overruled."
June 14.	43	Rescript from Supreme Judicial Court. (Same as paper #42).
June 15.	44	Plaintiff's motion to amend writ and amendment and allowed June 18, 1928.
June 20.	45	Defendant's motion to stay entry of judgment and allowed. (See order).
July 3.	46	Plaintiff's motion for judgment.
July 6.		Plaintiff's motion (paper 46) "The order of June 29, 1928, staying entry of judgment is hereby vacated."
July 30.		Judgment for Plaintiff.
		Damages $183,575.91
		Costs $81.05

(October 23rd, A. D. 1928.)

Attest: Francis A. Campbell, Clerk. (Seal.)

[fol. 68] In Supreme Judicial Court of Massachusetts

Opinion

Pierce, J.:

In this action the plaintiff seeks to recover damages because of the breach of a written contract. The plaintiff's declaration consists of one count, in the terms which follow: "The plaintiff says that the defendant on or about October 25, 1899, entered into a contract in writing with the Boston & Albany Railroad Company, a copy of which is hereto at-

tached and marked 'A'; that said contract was to continue in effect until August 30, 1940; that under said contract the defendant was obligated to pay Fifteen Thousand Dollars ($15,000.00) per annum for the use of a portion of the Boston & Albany Railroad between Agawam Junction and Springfield, Massachusetts; that the plaintiff succeeded to all the rights of the Boston & Albany Railroad Company, in said contract as the lessee of the Boston & Albany Railroad by virtue of a lease dated November 15, 1899; that the plaintiff and its predecessor, the Boston & Albany Railroad Company, have at all times been ready and willing to perform and have offered to perform the said contract, and have performed said contract, except in so far as they have been prevented from so doing by the acts of the defendant; that the defendant under date of November 9, 1921, notified the plaintiff that on December 15, 1921, it would cease to operate its trains over the Boston & Albany Railroad under said contract and would refuse to make any further payments under said contract; that the defendant thereafter refused to pay to the plaintiff the bills due under said contract or to perform said contract after said December 15, 1921; all to the great damage of the plaintiff."

[fol. 69] The defendant's substitute answer denies each and every allegation in the plaintiff's "writ and declaration contained. And for further answer to the plaintiff's declaration the defendant says that the alleged contract attached to the plaintiff's declaration as Exhibit 'A' was signed in pursuance of a previous agreement dated May 9, 1898, between the Boston & Albany Railroad Company, the Hartford & Connecticut Western Railroad Company, and the Philadelphia, Reading and New England Railroad Company and its Reorganization Committee, by the terms of which the defendant, Central New England Railway Company, was to be organized to enter into said Exhibit 'A'; that, after the making of the contract alleged in the plaintiff's declaration both by the action of the plaintiff and the Boston & Albany Railroad Company; jointly and severally, and also because of other circumstances not within the possible contemplation of the parties thereto at the time of the making of said agreement, the operation of

trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant was rendered illegal, impossible, and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts. And for further answer to the plaintiff's declaration the defendant says that on September 8, 1921, in accordance with paragraphs 18 and 19 of Section 1 of the Interstate Commerce Act (41 U. S. Statutes at Large 474) a certificate of public convenience and necessity was issued to the defendant by the Interstate Commerce Commission, a copy of which is marked 'Exhibit B' and annexed hereto and made a part of this answer; that in pursuance of and in reliance on this certificate the defendant abandoned its line of railroad extending from Feeding Hills [fol. 70] in the Town of Agawam, County of Hampden, Massachusetts, to its connection with the Boston & Albany Railroad, and ceased the operation of trains over this line into the City of Springfield, Massachusetts, by way of the plaintiff's tracks as provided in Exhibit 'A' of the plaintiff's declaration."

After a trial and verdict for the plaintiff in the Superior Court, the case comes before this court on two substitute bills of exceptions, one of the plaintiff and the other of the defendant. The bill of exceptions for the plaintiff is addressed mainly to rulings of the presiding judge on the measure of damages and as to the burden of proof upon the issue of the amount of damages. The exceptions of the defendant relate (1) to the refusal of the presiding judge to grant its motions to dismiss the action, in substance because, as it is alleged, the Federal statutes have given to the Federal courts exclusive jurisdiction of the subject of this case; (2) to the refusal of the presiding judge to grant its motion for a directed verdict; (3) to the admissibility or rejection of testimony; and (4) to the granting of certain requested rulings of the plaintiff, and to the refusal to give certain requests for rulings made by the defendant.

The contract relied on by the plaintiff, in substance above set out, is contained in an instrument under seal, executed

by the Boston & Albany Railroad Company and the defendant. The plaintiff's right to bring this action rests on two assignments, (1) that of the Boston & Albany Railroad Company to the New York Central & Hudson River Railroad Company, dated November 15, 1899, and contained in a lease of the Boston & Albany Railroad Company to the New York Central & Hudson River Railroad Company, which was executed subject to the approval of the Legis- [fol. 71] lature, and approved, with certain stipulations, by St. 1900, c. 468; the stipulations were accepted September 19, 1900; Boston & Albany Railroad v. New York Central Railroad, 256 Mass. 600, 614; and (2) an assignment through the lease of the New York Central & Hudson River Railroad Company to the plaintiff, which was admitted without objection by the defendant. The plaintiff offered in evidence the agreement between the Boston & Albany Railroad Company and the defendant, dated October 25, 1899, upon which the plaintiff bases its right to recover in this action. The defendant did not file any denial of the genuineness of the signatures to this instrument, nor any notice that it would require proof of them at the trial; G. L. c. 231, § 29; Scholl v. Gillman, Mass. Adv. Shs. (1928) 897, 899; and in response to a request under G. L. c. 231, § 69, as amended by St. 1926, c. 381 § 1, it admitted the execution of the agreement, but not the authority of the persons whose signatures appear thereon to bind the corporation. The agreement was admitted in evidence subject to the exception of the defendant upon the question of authority, no other objection or exception being argued. Under Rule 37 of the Superior Court (1923) the defendant admitted "that payments covering operation under the agreement of October 25, 1899 from September 12, 1902 to December 15, 1921 were made by the Central New England Railway Company to the Boston & Albany Railroad Company (New York Central & Hudson River Railroad Company lessee) until sometime in 1914 and to the Boston & Albany Railroad Company (New York Central Railroad Company, lessee) from 1914 to 1921. Said payments were for the total amount and were all of the charges made by the Boston & Albany Railroad Co. (New York Central & Hudson River Railroad Company or New York Central Railroad Company, lessee, as the case might be) on account

[fol. 72] of operation under the agreement of October 25, 1899 from that date until December 15, 1921. The defendant has not operated under the agreement of October 25, 1899 nor made payments under the same since December 15, 1921."

In June, 1921, the defendant, under § 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920, 41 U. S. Sts. at Large, 474, "filed an application for a certificate that the present and future public convenience and necessity permit the abandonment of a line of the applicant's railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Hampden county, Mass., distance of approximately 1.87 miles." On this application the report of the commission is in part as follows: The Central New England Railway Company "owns and operates about 300 miles of track in its entire system. Its trains enter Springfield, a city of more than 100,000 inhabitants, by using 4.05 miles of track of the Boston & Albany railroad. Under the trackage agreement the applicant is to pay the Boston & Albany railroad company $15,000 a year for the right to operate over this track not more than 3 freight trains of 30 cars each and 3 passenger trains daily. This agreement expires August 30, 1940. The applicant proposes to abandon about 1.87 miles of track extending from Agawam to is connection with the Boston & Albany. The traffic is very light over this line; it is handled in one mixed train a day for the present time and it is not likely to increase in the near future. From Agawam an electric line runs directly into Springfield, hauling passengers and light freight. For the year 1920 the revenue derived from the line proposed to be abandoned was $2,686.04, and the operating expenses were [fol. 73] $41,518.62, resulting in an operating loss of $38,832.58. Upon the facts presented we find that the present and future public convenience and necessity permit the abandonment of the line in question. A certificate to that effect will accordingly be issued."

On September 8, 1921, the commission issued a certificate of public convenience and necessity in the following form:

"Investigation of the matters and things involved in this proceeding have been had, and said Division having, on

the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof: It is hereby certified, That the present and future public convenience and necessity permit the abandonment by the Central New England Railway Company of its line of railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Massachusetts, as described in the application and report aforesaid; It is ordered, That said Central New England Railway Company be, and it is hereby, authorized to abandon said line of railroad; It is further ordered, That said Central New England Railway Company, when filing schedules canceling tariffs applicable to said line of railroad, shall in such schedules make specific reference to this certificate by title, date and dockets number." On November 9, 1921, the defendant sent the Boston & Albany Railroad Company a letter, which reads: "Please take notice that this Company will discontinue operation of its lines north of Feeding Hills station, and between there and Agawam Junction, effective December 15, 1921. At said date this Company will cease to make use of the license and permission acquired by it by [fol. 74] virtue of contract with your Company of October 25, 1899, and will discontinue payments thereunder as of said date. The above discontinuance of operation is by virtue of certificates of the Interstate Commerce Commission, Division 4, dated September 8, 1921, in the matter of application of the Central New England Railway Company for a certificate of public convenience and necessity, Finance Docket #1479. If any questions of detail arise in connection with the discintinuance, they may be taken up and settled by mutual agreement between representatives of the two Companies."

It is not disputed that the branch line in question was open and that the defendant began the operation of its trains thereover on September 15, 1902, and continued such operation with gradual decrease in the number of trains operated until December 15, 1921, when, pursuant to a written notice dated November 9, 1921, the defendant ceased the operation of trains over the tracks of the plain-

tiff and declined to make any further payments under the contract; and it is also admitted that, since December 15, 1921, the defendant has never operated any trains over the tracks of the plaintiff into Springfield or West Springfield, nor has it made any payments in accordance with the terms of the agreement and has since failed to exercise its rights thereunder, pursuant to its letter of November 9, 1921. A lengthy correspondence between the plaintiff and defendant followed the letter of November 9, after which, on April 5, 1922, this action was brought to recover damages at the rate of $15,000 a year for more than eighteen years.

We shall consider the motion of the defendant to dismiss, in connection with its motion for a directed verdict. [fol. 75] The Interstate Commerce Act as amended by the Transportation Act of February, 1920, 41 U. S. Sts. at Large, 456, 477, 478, § 1, paragraphs 18-20, inclusive, upon which the defendant relies to sustain its motion to dismiss for want of jurisdiction, as also in support of its motion for a directed verdict, reads:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commissioner a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply

to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be [fol. 76] heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation may be enjoined by any court of competent jurisdiction operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes consents to or permits any violation of the provisions of this paragraph or of paragraph (18) of this section shall upon conviction thereof be punished by a fine of not more than $5000 or by imprisonment for not more than three years, or both."

[fol. 77] The matter of first importance, because it affects the jurisdiction of the court, is the contention that the cer-

tificate of public convenience and necessity issued to the defendant by the interstate commerce commission is a defence to this action. Congress in the exercise of its power to regulate interstate commerce may unquestionably in the interests of the public at large authorize the interstate commerce commission to permit an interstate carrier to abandon an existing obligation without thereby incurring a liability. Union Bridge Co. v. United States, 204 U. S. 364, 399, 400. Hadacheck v. Los Angeles, 239 U. S. 394. New York v. United States, 257 U. S. 591, 601. Dayton-Goose Creek Railway v. United States, 263 U. S. 456, 478. Commonwealth v. Alger, 7 Cush. 53, 85, 86. Donham v. Public Service Commissioners, 232 Mass. 309, 316, 317. Brett v. Building Commissioner of Brookline, 250 Mass. 73, 77. Compare Railroad Commission of Texas v. Eastern Texas Railroad, 264 U. S. 79, 85. The issues here are whether Congress conferred such authority on the interstate commerce commission and, if Congress did, whether the authority so conferred has been exercised. It is fundamental that the act of Congress and the order of the interstate commerce commission will not be construed to deprive the Boston & Albany Railroad Company or its successor, the New York Central Railroad Company, of its vested rights unless it appears by express words or plain implication that such was the intention of both Congress and the commission. Sewall v. Jones, 9 Pick. 412, 414. Commonwealth v. Tewksbury, 11 Met. 55, 57. Commonwealth v. Hayden, 211 Mass. 296, 297. Regina v. Guardians of Mallow Union, 12 I. C. L. 35, 41. Metropolitan Asylum District v. Hill, 6 App. Cas. 193, 208. Western [fol. 78] Counties Railway v. Windsor & Annapolis Railway, 7 App. Cas. 178, 188. See Texas v. Eastern Texas Railroad, 258 U. S. 204, 217, 218. This rule of construction, however, does not go to the extent of destroying the purpose underlying the legislation. It will be assumed that Congress, in enacting Interstate Commerce Act, § 1, paragraphs 18-20, as amended by 41 U. S. Sts. at Large, 456, 477, 478, authorized the commission to sanction the abandonment by an interstate carrier of a contractual obligation, such as existed between the parties in the case at bar, with impunity. Chief Justice Taft, in Dayton-Goose Creek Railway v. United States, supra, said that the Transportation Act

* * * seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged. * * * To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety."

Mr. Justice Brandeis, in Colorado v. United States, 271 U. S. 153, 162, said:

[fol. 79] "The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intra-

state commerce at a large loss. The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss."

See in this connection the Congressional Record of the 66th Congress, 2d Session, on pages 131, 825, 862 and 863.

The question remains whether the interstate commerce commission has exercised the authority which, it has been assumed, Congress has conferred on it. The solution rests [fol. 80] in a construction of the report and certificate of the commission. We are of opinion the certificate of the interstate commerce commission is not a defence to this action for the reason that it does not appear by express words or clear implication that the commission intended to deprive the Boston & Albany Railroad Company, or its successor, of its rights under the agreement with the Central New England Railway Company. This view of the intention of the interstate commerce commission finds support in the admitted fact that the application of the defendant was submitted to the commission "without formal hearing," and without the plaintiff being made a party to the proceedings. It is supported by the further fact that it is not to be supposed by implication that the interstate commerce commission intended to adjudicate without a hearing that the $15,000 annual payment was included in the operating charges of the defendant railroad.

The defendant sustained an operating loss on the sections of the lines now abandoned, for the year 1920, of $38,832.58, which the commission, apparently, desired to wipe out. The operating loss was ascertained by deducting the revenue, $2,686.04, from the operating expenses, $41,518.62. The annual rental for this section of the lines could have been found to be a fixed charge and not an operating expense. Schmidt v. Louisville, C. & L. Railway, 119 Ky. 287, 301, 305. In Reagan v. Farmers' Loan & Trust Co. 154 U. S. 362, in the financial statement on page 406 the rental for use of a bridge is not included in operating ex-

penses. Compare Adams v. Eastern Massachusetts Street Railway, 257 Mass. 115, 132, Galveston Electric Co. v. Galveston, 258 U. S. 388, 399, Nampa & Meridian Irr. Dist. v. Bond, 288 Fed. Rep. 541, 543, Fleischer v. Pelton Steel Co. 183 Wis. 451, 458, 459.

The end sought by the commission in issuing the certifi- [fol. 81] cate, the wiping out of the operating loss, does not involve the removal of the fixed charge for rental. In addition both parties to the agreement are interstate carriers. It is natural to assume that if the commission had intended to take away an asset from one carrier for the purpose of relieving another carrier of liability, it would have required further facts and dealt with this question specifically. See in this connection Control of Hereford Railway, 99 I. C. C. 7.

The defendant contends that its motion to dismiss for want of jurisdiction should have been allowed. This case, however, is not brought to enjoin, set aside, annul, or suspend in whole or in part the order of the Interstate Commerce Commission in view of the construction of this order adopted. The contention that the court did not have jurisdiction to construe the order is groundless. Great Northern Railway v. Merchants Elevator Co., 259 U. S. 285, and cases collected in note, page 295, and references therein to Cheney v. Boston & Maine Railroad, 227 Mass. 336, as contra.

Under the terms of the contract the defendant agreed to pay $15,000 per annum in return for the plaintiff's promise to "license and permit * * * [it] to pass with trains * * * over the line of the [plaintiff's lessor]." The agreement is free from ambiguity and indicates beyond a doubt that the annual payment was to be made irrespective of use. It was consideration paid for the right to use and not for the use, and as so construed it does not involve a forfeiture. If it be assumed that the agreement is in the nature of a license rather than an easement in gross, Goldman v. Beach Front Realty Co. 83 N. J. L. 97, 99, 100, or a trackage contract for a stated period, Union Pacific Railway v. Chicago, Rock Island & Pacific Railway, 163 U. S. [fol. 82] 564, and has the usual characteristic of a license, namely, revocability, it does not follow that the license can be revoked by either party with impunity.

We think the Central New England Railway Company under the terms of the agreement can be held liable for

breach of contract. Williston, Contracts, vol. 1, § 493. McCrea v. Marsh, 12 Gray, 211. King v. David Allen & Sons, Billposting, Ltd. [1916] 2 A. C. 54. Kerrison v. Smith [1897] 2 Q. B. 445. United Merchants' Realth & Improvement Co. v. American Billposting Co. 128 N. Y. Supp. 666, 667. The promise of the Boston & Albany Railroad Company was not, therefore, purely illusory. The case of Whittemore v. New York, New Haven & Hartford Railroad, 191 Mass. 392, is clearly distinguishable; there the term of the agreement, "that whenever said first party may find it necesary for the accommodation of its business to remove said spur track," no claim for damages shall be made, was the decisive factor. The lease by the Boston & Albany Railroad Company to the New York Central Railroad Company did not revoke the license. Under the terms of the lease of the defendant and the Boston & Albany Railroad Company the former assumed all the obligations of the latter. It is clear, therefore, that the Boston & Albany Railroad Company did not intend to revoke the license by the assignment. It is not open to serious doubt that under the terms of the agreement betwen the Boston & Albany Railroad Company and the Central New England Railway Company, the duties of the former could be delegated. The seventh paragraph of the agreement provides in part that "in case of a breach of any of the stipulations to be observed on the part of the New England Company or of those claiming under it, and a continuance of such breach for thirty (30) days, or in case the rights under this contract shall be taken from said New England Company or [fol. 83] its successor or transferee * * * the Albany Company or its successors may, while the default or neglect continues, * * * without any notice or demand, terminate this contract * * *" See in this connection Williston, Contracts, vol. 1, §423. The defendant admittedly paid a sum of money annually over a period of nineteen years to the plaintiff or to its predecessor, the New York Central & Hudson River Railroad Company. See Boston & Albany Railroad v. New York Central Railroad, 256 Mass. 600, 609. Such action on its part prevents it from now objecting to the assignment. Nelson Threatre Co. v. Nelson, 216 Mass. 30, 34. Saxeney v. Panis, 239 Mass. 207, 210.

The exceptions taken to the refusal to grant the motion to dismiss and to direct a verdict for the defendant, in so far as they are based upon its requests numbered two, and nineteen, which read: (2) "The duties imposed upon the Boston & Albany Railroad Company by the agreement sued on were such as could not be delegated to the New York Central Railroad Company so that the defendant is relieved from liability on its undertakings"; (19) "the lease of the Boston & Albany Railroad Company to the New York Central and Hudson River Railroad Company dated November 15, 1899, effective July 1, 1900, is a revocation and termination of the license and privileges granted by the agreement of October 25, 1899"; and to the granting of the request of the plaintiff numbered ten, which reads: "As matter of law, the execution of the agreement and supplemental agreement of November 15, 1899, leasing to the New York Central & Hudson River Railway Company for a period of ninety-nine (99) years from July 1, 1900, the railroad system and equipment of the Boston & Albany Railroad Company does not constitute a defense to this action" must be overruled. In so far as these exceptions are based [fol. 84] upon the defendant's request numbered four which reads: "There is no evidence in this case that would warrant the jury in finding that the defendant is bound by any obligation existing under any agreement between it and the New York Central Railroad Company"; and to the granting of request of the plaintiff numbered seventeen, which reads: "As matter of law, the plaintiff as lessee or assignee of the lessee of the Boston & Albany Railroad Company has a right to bring this action," they must be sustained. "A third person cannot maintain an action on a sealed instrument to which he is not a party." Cavanaugh Bros. Horse Co. v. Gaston, 255 Mass., 587, 590.

The defendant's exception to the exclusion of the offer of proof, in which circumstances surrounding the execution of the lease are set forth tending to prove, it is contended, that the defendant was not under a liability to pay irrespective of use, must be overruled. Under the law of this Commonwealth such evidence is inadmissible when the agreement is unambiguous in its terms. Snider v. Deban, 249 Mass. 59, 61.

The defendant asked a witness on cross-examination the following question: "Did the New York Central Railroad Company by its own or leased or controlled lines during the period from 1902 to 1921 have its own routes and access to territory to the southwest of Maybrook and Campbell Hall, and did the New York Central own or control lines as part of its system in the territory southwest of Campbell Hall, particularly of such centers as Scranton, Wilkesbarre, Williamsport, and Pittsburgh, Pennsylvania?" The defendant saved an exception to the exclusion of this question and then offered to prove by the same witness that "the plaintiff, * * * by its own and leased or controlled lines had its own routes and access to the territory to the [fol. 85] southwest of Maybrook and Campbell Hall, and that the lines owned and controlled by the plaintiff as a part of its railroad system extended to the same strategic points in the territory to the southwest of Campbell Hall as did the lines of the carriers with which the defendant connected at Maybrook and Campbell Hall; that the route of the defendant and the lines with which it connected at Campbell Hall and Maybrook was the shorter and more direct route from Springfield, Massachusetts, to the coal territory in a generally southwesterly direction and particularly to such centers as Scranton, Wilkesbarre, Williamsport, Clearfield, and Pittsburgh, Pennsylvania; and that after the lease by the plaintiff of the Boston & Albany Railroad, which up to that time had been an independent carrier with no particular western or southwestern affiliations, any traffic from Springfield and points east destined for the territory to the southwest of Campbell Hall would, in the ordinary course of events, be and was taken by the plaintiff and routed over its own line, even though the defendant's route was more direct; thus depriving the defendant of the through traffic which the plaintiff knew, and which was contemplated by the parties to the original agreement of 1898 and 1899, to be the only possible means of operation on its Springfield branch without loss." The trial judge rejected this offer of proof and an exception was duly saved.

The defendant offered its certificate of incorporation to show the men who were its organizers and the fact that they

knew and fully understood that it was possible to operate without loss, to Springfield, Massachusetts, only by through traffic from and to Springfield and points east, to and from the territory southwest of Maybrook and Campbell Hall, [fol. 86] and that such through traffic was the means of performance contemplated and relied on by them in executing the agreement of October 25, 1899. This offer was rejected and the defendant's exception duly saved.

The defendant made the following offers of proof: "* * * in 1898 and thereafter the plaintiff and the Boston & Albany Railroad Company knew that local traffic from and to other stations on the Central New England Railway Company and Springfield and points east thereof could not possibly be sufficient to permit the operation of the branch line, constructed in pursuance to the agreement and reorganization of 1898, without tremendous loss, and that the only means of operating said line without loss was by obtaining through traffic from and to points in the territory to the southwest of Campbell Hall and Maybrook and Springfield and points east thereof; * * * that the persons who organized and/or controlled the defendant corporation in 1898 at the time of reorganization and arrangement which resulted in the agreement sued on were influential in and thoroughly familiar with the operations of and the control of the Boston & Albany Railroad Company, and particularly closely associated with the men in charge of * * * [that company]; that the parties to the agreements of May 9, 1898, and October 25, 1899, fully understood that the branch line of the defendant could not be operated nor the agreement performed unless through traffic over the defendant's route from and to Springfield and points east to and from the territory to the southwest of Maybrook and Campbell Hall was developed; that such through traffic was the means of performance contemplated and relied on by the parties to this original arrangement of 1898 and the destruction and failure of such through traf-
[fol. 87] fic has taken from operation by the defendant under the agreement the expected value of performance and destroyed the only possible and the contemplated means of operation and performance without loss; * * * that the plaintiff, with knowledge * * * [of] the only possible means of operation under and performance of the agree-

ments of May 9, 1898, or October 25, 1899, * * * after it had leased the Boston & Albany Railroad, refused to allow, permit or join with the defendant in establishing such through rates and affirmatively took steps to obtain and keep for itself all traffic to and from Springfield and points east and points to the west, southwest or south; * * * that the men who organized and/or controlled the defendant corporation in 1898 and at the time of the organization and arrangement which resulted in the agreement sued on included a director of the Boston & Albany Railroad Company, who was also a brother-in-law of the then president and a son of the former president of the Boston & Albany Railroad Company; and that the men who owned a voting control of the defendant at the time of its organization and for a time thereafter were a son of a former president of the Boston & Albany Railroad and a blood relation of his, the former of said men being also a brother-in-law of the then president and the then vice-president of the Boston & Albany Railroad Company, both of which gentlemen were sons-in-law of a former president of the Boston & Albany Railroad Company."

The defendant also offered to show "that at Maybrook and Campbell Hall, New York, it had connections with numerous through carriers serving directly the territory to the west, southwest and south, in particular, the Pennsylvania Railroad System, the Baltimore & Ohio, the Erie, the Delaware, Lackawanna & Western, the Lehigh & New England and the Lehigh & Hudson Railroad." The defendant excepted to the exclusion of this offer of proof. [fol. 88] The admissibility of it as indicating the circumstances under which the agreement was made has been previously discussed.

The defendant argues that all its exceptions to the offers of proof should be sustained. The offers of proof were properly excluded. The defendant, in substance, is seeking to have read into the agreement stipulations on the part of the Boston & Albany Railroad Company not to compete, and to undertake to divert traffic to the defendant's lines. The principle, that if one party to a contract hinders performance by the other party performance by the latter is excused, does not warrant placing such an interpretation upon the contract the parties have chosen to make. More-

over, the fact that the defendant became a party to the agreement relying upon certain traffic to prevent it from operating at a loss, a fact that was within the knowledge of the other party, will not excuse performance by the defendant if such traffic is not obtained. John Soley & Sons, Inc. v. Jones, 208 Mass. 561. Morse v. Boston, 260 Mass. 255, and cases cited.

It is contended that the certificate of the interstate commerce commission was admissible upon the question of repudiation of the agreement; that the certificate is set forth as the reason for the discontinuance of the operation of the road in two of the four letters on the basis of which the jury were instructed that they could find that the agreement was repudiated. The certificate is not material upon the question of repudiation because it does not justify the repudiation. The fact that the defendant believed it was justified in acting as it did is of no legal consequence.

The defendant argues that the correspondence between the president of the Central New England Railway and the [fol. 89] vice-president of the Boston & Albany Railroad was improperly admitted. Objections were made and exceptions saved to the admissibility of some of these letters at the time of their introduction, and subsequent to the introduction, of all the letters a motion was made to strike out all the correspondence after the letter of November 9, 1921, to the denial of which an exception was saved. The judge at the time of the denial of this motion instructed the jury that "the letters have been admitted solely upon the question whether the defendant Railroad Company abandoned the contract that it had with the plaintiff Railroad Company, and for no other purpose. If it be assumed that the letters were written for settlement purposes, they were admissable, nevertheless to establish an abandonment of the agreement, within the principle that evidence of an admission by a party of a fact which is not itself being discussed by the parties in connection with the proposed settlement is competent although made in the course of the settlement proceedings. Dickinson v. Dickinson, 9 Met. 471, 474. Durgin v. Somers, 117 Mass. 55, 61. Wigmore on Evidence (2d ed.) §1061. The case is not similar in this respect to Garber v. Levine, 250 Mass. 485, 489, 490. In the circumstances here disclosed we do not think the defendant was harmed by

the allowance of the single letter, dated January 3, 1922, which bore the legend "without prejudice."

The defendant offered in evidence figures showing the cost of the maintenance of way, superintendence, dispatching trains, signal and interlocker operation, crossing protection and telephone and telegraph operation for each year from 1921 up to and including 1925 on the entire system of the Boston & Albany Railroad Company; and also, figures showing the total mileage of both freight and passenger trains and cars operated upon the entire system during the [fol. 90] same period. Under the agreement the defendant had the right to use all present and future water stations and other facilities necessary for the accommodation of trains and the traffic to be transported by them over the leased lines. The Boston & Albany Railroad was required in connection with the passenger business of the defendant to sell tickets, handle baggage, and take care of passenger trains in its passenger yard and transfer through passenger cars to connecting lines; and it was to receive compensation for the transferring and switching of freight cars. The defendant desired to show the plaintiff's gain from the cessation of operation of the defendant's trains by dividing the total cost by the total mileage, as shown by the figures, and thus derive the average cost per mile. The plaintiff did not deny the accuracy of the figures but objected to their admissibility on the ground of remoteness and irrelevancy to the issue. The lack of uniformity in costs which necessarily exists in various sections of the system warranted the rejection of this evidence by the judge in the exercise of a sound discretion. See Dow v. Bulfinch, 192 Mass. 281, 285, 286. For the same reason the figures showing the cost, over the entire system, of locomotive repairs, other locomotive supplies, enginehouse expenses, train supplies and expenses and the total freight expenses for the month of December, 1921, were properly excluded.

The defendant has not been harmed by the admission of any evidence relating to the profit derived by the plaintiff from freight movements. The judge instructed the jury in accordance with the plaintiff's third additional request that "In considering any offsets to the plaintiff's right to recover the value of $15,000 payment, you should exclude from your consideration any interference to the plaintiff's

[fol. 91] traffic by reason of switching movements, so called, for which the plaintiff was entitled to additional compensation and for which they claim no profits in this action. That, you see, refers to the provision in the contract allowing the Boston & Albany two dollars for transfer or switching to Boston & Maine or New York, New Haven & Hartford connections and thirty cents for taking cars in the Springfield yard. This excludes from your consideration any testimony in regard to delays in the Springfield yard due to switching Central New England freight cars and making up or breaking up Central New England trains. As these switching movements would be paid for under another part of the contract, this evidence falls within the agreement of counsel and is not to be considered by you. Also you should disregard any figures in regard to delays or whether due to freight cars or freight trains operated between the west end of West Springfield yard and Springfield, as these items also fall within that part of the contract for which the plaintiff is claiming no damage * * * You may consider, however, in assessing damages, what offsetting benefits the plaintiff has received by reason of being relieved of the operation of trains over its railroad as distinguished from switching operations I have referred to. And in this connection I grant the following requests for instruction: '(1) The plaintiff cannot set off against any benefit to be derived by it because of the failure of the defendant to operate the full number of trains allowed by the contract, any possible profit to be derived by the plaintiff from switching operations or other supplementary privileges mentioned in the contract; (2) The jury cannot consider any figures relating to profit to be derived from switching operations to and from West Springfield yard to the Boston & Maine, New York, New Haven & Hart-[fol. 92] ford or Springfield freight house; (3) The plaintiff * * * is not and does not claim to be entitled to any profit which may have accrued to it by reason of those special switching or transfer operations * * *; (4) The jury will not consider any figures relating to revenue or expenses to be derived from the transfer of cars to and from the West Springfield yard and the Boston & Maine Railroad, the New York, New Haven & Hartford Railroad, or for points in Springfield except as I have al-

ready intimated to you'; and '(5) The jury shall not consider any benefits resulting to the plaintiff by reason of freedom from interference caused by transfers from and to the West Springfield yard and the Boston & Maine Railroad, the New York, New Haven & Hartford Railroad, or for points in Springfield.' "

The defendant argues that its exception to the granting of this last request should be sustained for the reason that "the breaking up Central New England trains" was not within the subject matter of its disclaimer. If the words "the breaking up Central New England trains" are read in their context, it is apparent that the judge was referring to movements of trains for which the Boston & Albany Railroad Company was entitled to specific compensation. The instruction is somewhat lacking in clarity, but if read in its entirety it indicates that the jury were to take into consideration, in determining the benefit derived by the Boston & Albany Railroad Company from the cessation of operation, all interference from trains and cars, except those for the movement of which under the terms of the contract it was entitled to specific compensation in addition to the annual rental. The words "breaking up" were not used in the sense the defendant contends they were used. It follows that this exception must be overruled.

[fol. 93] The defendant offered to show "that the right of way of the Boston & Albany Railroad Company between the west end of the West Springfield yard and Agawam Junction, Massachusetts, over which run the tracks of the said Boston & Albany Railroad Company and over which are operated the trains of the Boston & Albany Railroad, New York Central Railroad Company, lessee, is not and was not in 1898 and 1899 owned in fee by the Boston & Albany Railroad Company for a distance of more than 1200 feet; that for said distance of 1200 feet said right of way was obtained under and by virtue of a location made by the Western Railroad Company in pursuance of provisions of Chapter 116 of the acts of the Legislature of Massachusetts for 1833 and by virtue of a confirmatory location of the Boston & Albany Railroad Company." An exception was saved by the defendant to the exclusion of this offer. The offer of proof was rightly excluded. A statutory taking for general railroad purposes is broad

enough to permit the agreement entered into by the parties in the present case. See Morse v. Goddard, 13 Met. 177, 179, Gage v. Campbell, 131 Mass. 566, and Curtis v. Goodwin, 232 Mass. 538, 541.

The third paragraph of the agreement between the parties provided that the Boston & Albany Railroad Company should, among other things, "take care of passenger trains in its passenger yard." The judge left to the jury the question whether these words meant simply that the Boston & Albany Railroad Company was to place the cars as they were needed by the Central New England Railway Company or whether it was to sweep out the cars and wash the car windows, and instructed the jury in this connection that the manner in which the parties by their conduct interpreted this clause was to be taken into consideration. It is not, and could not be, contended successfully that the tes-[fol. 94] timony of the vice-president of the Boston & Albany Railroad Company to the effect that the plaintiff was obligated under the agreement to sweep out the cars and wash the car windows was binding upon the plaintiff. The words as used in the contract were of doubtful meaning and, therefore, the exception of the defendant to the instruction given must be overruled. Boston & Albany Railroad v. New York Central Railroad, 256 Mass. 600, 609.

We have considered all the exceptions of the defendant and find no reversible error, provided within ten days after rescript the plaintiff amends its writ by substituting the words "The Boston & Albany Railroad Company, Assignor for the benefit of The New York Central Railroad Company, Assignee," in place of the words "The New York Central Railroad Company" as plaintiff therein, leave to make such amendment being hereby granted. Currier v. Howard, 14 Gray, 511, 513. Pizer v. Hunt, 253 Mass. 321, 331. Since the defendant's exceptions are overruled the plaintiff consents that its exceptions be overruled.

Exceptions of defendant overruled.

Exceptions of plaintiff overruled.

[fol. 94a] Certificate to foregoing paper omitted in printing.

[fol. 95] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD TO ACCOMPANY THE DEFENDANT'S PETITION FOR AND WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

In view of the petition for certiorari which the defendant contemplates filing in the Supreme Court of the United States, and the defendant's desire to omit certain portions of the record of the States court, it is stipulated and agreed between the parties that the defendant does not thereby seek to raise and does not intend to raise any question concerning the measure of damages applied by the State courts; that said petition does not present and is not intended to present any question as to the legal execution and validity of the contract in suit except as it may be claimed to have been affected by the order of the Interstate Commerce Commission issued September 8, 1921, nor any claim that the plaintiff and its assignees have failed to perform said contract so far as it and they were permitted by the defendant to perform it.

[fol. 96] It is therefore hereby stipulated and agreed by and between the parties herto that in connection with the record to be printed for use with the defendant's petition to the Supreme Court of the United States for a writ of certiorari and the record for use with any writ of certiorari which may issue from said Supreme Court of the United States on said petition a considerable portion of the record as printed for use in the Supreme Judicial Court of the Commonwealth may be omitted as provided in the paragraph numbered I as hereinafter set out and that this stipulation, including the following sections numbered II, III, IV, V and VI, shall be printed as part of any record to be used with said petition for certiorari or with any writ issued thereon.

I. In the Defendant's Substitute Bill of Exceptions as printed for said Supreme Judicial Court of the Commonwealth the following portions may be omitted:

1. Beginning with the 9th line on page 17, through the 13th line on page 17, inclusive.

2. Beginning with the 15th line on page 17, through the first full paragraph ending in the 7th line from the bottom of page 20.

3. Beginning in the second line from the bottom of page 20 after the words "The witness," through the sentence ending with the words "Union Station" in the 3rd line of page 21.

[fol. 97] 4. Beginning with the words, "The passenger yard" in the 8th line of page 21 through and including the first full paragraph ending in the 6th line on page 22.

5. Beginning with the sentence in the 21st line on page 22: "I have seen that junction point——" through the end of that paragraph ending in the 11th line from the bottom of page 22.

6. The paragraph beginning with the 17th line on page 24 and ending in the 14th line from the bottom of page 24.

7. Beginning at the top of page 25, through the sentence ending, "very, very small" in the 14th line from the bottom of page 30.

8. Beginning with the words "As a general superintendent" in the bottom line of page 30 through and including the word "yard" in the 25th line of page 31.

9. Beginning with the words, "I was familiar" in the 29th line of page 31 through and including the word "trains" in the 7th line from the bottom of page 31.

10. Beginning with the words, "To the best" in the 4th line from the bottom of page 31 through the first full paragraph on page 32, ending with the words "with it."

11. Beginning with the 18th line on page 32 through the word "Springfield" in the 22nd line of page 32.

12. Beginning with the words, "From 1902" in the 8th line from the bottom of page 32, through the first full paragraph on page 34 ending with the words "make it safe."

13. Beginning with the sentence commencing in the 12th line from the bottom of page 34 with the words "A tower is for" through the sentence ending in the 7th line of page 35 with the words "signal tower."

[fol. 98] 14. Beginning with the sentence commencing in the 10th line on page 35, "to the best of my knowledge——" through the sentence ending in the first line at the top of page 37 with the words "freight trains."

15. Beginning with the sentence in the 3rd line on page 37 commencing with the words "I recognize——" through the paragraph ending in the 8th line of page 37.

16. Beginning with the words "I am familiar" in the 12th line of page 37, through and including the 22nd line on page 37.

17. Beginning with the sentence commencing in the 11th line of page 38, with the words "After December 15, 1921" through the sentence ending in the 16th line on page 38, with the words "trips per day"

18. Beginning with the sentence "On cross-examination" in the 14th line from the bottom of page 38, through and including the statement of Mr. Hall in the 14th line on page 58.

19. Beginning at the top of page 59 through and including the paragraph ending in the 9th line of page 64.

20. Beginning with the paragraph commencing in the 13th line on page 64, through the words "First witness" in the 10th line from the botom of page 64.

21. Beginning with the 7th line from the bottom of page 64, through the words "Mr. Regan also" in the 9th line of page 65.

22. Beginning with the phrase, "that price is paid" in the 11th line on page 65, through the paragraph ending in the 17th line of page 69.

[fol. 99] 23. Beginning with the 3rd line from the bottom of page 69, through the paragraph ending in the 11th line of page 70.

24. Beginning with the 28th line of page 70, through and including the 2nd line from the bottom of page 70.

25. Beginning with the 15th line on page 71 and running to the 5th line from the bottom of page 72.

26. Beginning with the words "During this" in the 7th line on page 73 and running to the 20th line on page 107, both inclusive.

27. Beginning with the 14th line on page 108 and running to the 3rd line from the bottom of that page, both inclusive.

28. Beginning with the 10th line on page 109 and running to the 12th line from the bottom of page 110, both inclusive.

29. Beginning with the 2nd line from the bottom of page 110 and running to the 20th line on page 112, bot inclusive.

30. Beginning with the 25th line on page 112 and running to the 3rd line from the bottom of page 114, both inclusive.

31. The words "(You may be seated, Mr. Foreman and gentlemen of the jury)" on page 115.

32. The 2nd line from the bottom on page 119 is to read, "if they do not say so" instead of "if they do say so."

33. Beginning with the 8th line on page 120, through and including the 13th line on page 126.

[fol. 100] 34. The words "That was taken care of" in the 14th line on page 126.

35. Beginning with the statement by the Court in the 18th line from the top of page 126, through and including the paragraph ending with the words "issue of benefits" in the 11th line from the bottom of page 128.

II. As to the 35 exhibits put in evidence at the trial in the Superior Court and referred to and made a part of the defendant's bill of exceptions, it is hereby agreed by and between the parties hereto as follows:

1. Exhibits 1 and 2 need not be set out or printed in full, it being agreed that the quotations from them set out in the Defendant's Substitute Bill of Exceptions are correct, that no question is raised as to their execution or legality nor to their effectiveness as assignments of all rights of the Boston & Albany Railroad Company to and under the contract in suit, nor to the fact that by them the assignees assumed all the obligations of the Boston & Albany Railroad Company under said contract, nor that the respective assignees performed all said obligations during their control of the Railroad Company as such assignees until December 15, 1921.

2. Exhibits 3, 5, 7, 8, 11 to 21 inclusive, 24, 25, 26, 28, 31 and 32 are to be incorporated in full and made a part of the record.

3. Exhibits 22, 23 and 29 are hereby referred to and made a part of the record as specified in the original record, but said Exhibits 22, 23 and 29 need not be otherwise printed or set out.

[fols. 101 & 102] 4. Exhibits 4, 6, 9, 10, 27, 30, 33, 34, 35, B for identification, and C for identification, are to be omitted.

III. It is further stipulated and agreed that the date of plaintiff's writ in this action was April 5, 1922.

IV. It is further stipulated and agreed that the Plaintiff's Bill of Exceptions which presented only exceptions of the plaintiff to the Court's rulings on the measure of damages, and which the plaintiff stipulated might be overruled by the Supreme Court of the Commonwealth, if that Court overruled the defendant's exceptions, may be omitted from the record.

V. It is further stipulated and agreed that by the execution of this stipulation the plaintiff is not to be deemed to have made any admission as to the materiality of the matter that remains in the Defendant's Substitute Bill of Exceptions.

VI. This stipulation when executed and filed is to become a part of the record in the case and is to be printed as such and those portions of the Defendant's Substitute Bill of Exceptions which are omitted by this stipulation are to be indicated by asterisks when the balance of said substitute bill of exceptions is printed for use in the Supreme Court of the United States.

George L. Mayberry, Lowell A. Mayberry, Attorneys for Boston & Albany Railroad Company, Assignor for the benefit of New York Central Railroad Company. John L. Hall, Marcien Jencker, Attorneys for Central New England Railway Company.

Endorsed on cover: File No. —. Massachusetts Superior Court for Suffolk County. Term No. —. Central New England Railway Company, petitioner, vs. Boston & Albany Railroad Company, assignor, for the benefit of New York Central Railroad Company, assignee. Petition for writ of certiorari and exhibit thereto. Filed —— —, 1928. File No. —.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1928

No. 532

CENTRAL NEW ENGLAND RAILWAY COMPANY, Petitioner,

v.

BOSTON & ALBANY RAILROAD COMPANY, Assignor, for the Benefit of New York Central Railroad Company, Assignee

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI UNDER SECTION 8 (a), ACT OF FEBRUARY 13, 1925

On consideration of the motion of counsel for the petitioner in the above entitled cause, and good cause therefor having been shown,

It is now here ordered that the time within which a petition for a writ of certiorari may be filed herein be, and the same is hereby, extended for a period of fifteen (15) days from this date.

Dated this 27th day of October, 1928.

Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States.

[Endorsed:] File No. 33,841. Supreme Court U. S., October Term, 1928. Term No. 532. Central New England Ry. Co., petitioner, vs. Boston & Albany R. R. Co., assignor, etc. Order extending time within which to file petition for certiorari. Filed Oct. 27, 1928.

Supreme Court of the United States

Order Allowing Certiorari—Filed January 2, 1929

The petition herein for a writ of certiorari to the Superior Court for Suffolk County, State of Massachusetts, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5165)